FARIDAH ARIFFIN A

v.

DR LEE HOCK BEE & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
ABDUL MALIK ISHAK J
[SUIT NO: S6-22-1973-2003]
19 DECEMBER 2005

EVIDENCE: *Expert evidence - Expert reports - Whether privileged - Expert medical reports - Statements made by lay witnesses to litigants and solicitors - Legal professional privilege - Whether a common law right - Evidence Act 1950, s. 126 - Whether privilege removed by O. 34 r. 4(2)(f) Rules of the High Court 1980 - Whether judge can order discovery of medical experts' reports under O. 34 r. 4(2)(f) in view of O. 25 r. 8(5)(b) and privilege under common law - Whether expert may still be called to give oral evidence at trial* C D

EVIDENCE: *Privilege - Legal professional privilege - Whether a common law right - Evidence Act 1950, s. 126 - Whether privilege overridden by O. 34 r. 4(2)(f) Rules of the High Court 1980 - Whether O. 34 r. 4(2)(f) & (j) ultra vires Evidence Act 1950 and common law - Whether judge can order discovery of medical experts' reports under O. 34 r. 4(2)(f) in view of O. 25 r. 8(5)(b) and privilege under common law* E F

CIVIL PROCEDURE: *Rules of the High Court 1980 - Subsidiary legislation - Whether can derogate from substantive laws of evidence - Whether O. 34 r. 4(2)(f) & (j) Rules of the High Court 1980 ultra vires Evidence Act 1950 and common law - Legal professional privilege, whether can be overridden by subsidiary legislation - Powers of Rules Committee - Whether Chief Judge has power to suspend summons-for-directions procedure by way of practice direction - Practice Direction No. 1 of 2001 - Whether O. 25 r. 8(5)(b) remains in effect notwithstanding O. 34 r. 4(2)(f)* G H

CIVIL PROCEDURE: *Pre-trial case management - Directions and orders - Expert reports - Statements made by lay witnesses to litigants and solicitors - Legal professional privilege - Whether privilege removed by O. 34 r. 4(2)(f) Rules of the High Court 1980 - Whether judge can order discovery of medical experts' reports under O. 34 r. 4(2)(f) in view of O. 25 r. 8(5)(b) and privilege under common law - Whether expert may still be called to give oral evidence at trial* I

A ***CIVIL PROCEDURE:*** *Trial by affidavit - Witness statement - Evidence-in-chief-by way of affidavit - Exchange of witnesses' statements - Whether agreement of all parties necessary - Validity of O. 35A Rules of the High Court 1980 - Whether O. 35A ultra vires s. 138(1) Evidence Act 1950 and s. 15 Courts of Judicature Act 1964*

B

Durings case management before trial, the judge had applied O. 34 r. 4(2)(f) of the Rules of the High Court 1980 ('RHC') and ordered the parties to deliver their medical experts' reports by the next case management date and, applying O. 35A rr. 1 & 2 of the C RHC, also ordered the parties to prepare and exchange witnesses' statements in affidavit form. The Chief Judge (Malaya) had by Practice Direction No. 1 of 2001 suspended the application of O. 25 of the RHC which provides for summons for directions procedure. Order 34 RHC had also been amended by the Rules D Committee by way of making the Rules of the High Court (Amendment) Rules 2000 so as to introduce a case management procedure. At the request of counsel for the respective parties, the judge heard their arguments against the making of the orders.

E **Held (setting aside the orders):**

(1) In Malaysia, experts reports are privileged, even if made in anticipation of a claim. The same would apply to statements made by lay witnesses to litigants and their solicitors for the purpose of the litigation. Legal professional privilege attaching F to experts' reports is a basic and fundamental common law right which is affirmed by an Act of Parliament in the form of s. 126 of the Evidence Act 1950.

(2) Privilege cannot be taken away by subsidiary legislation in the G form of the RHC, including O. 34 r. 4(2)(f) thereof. The Rules Committee has no power to make rules altering the law of evidence. Rules 4(2)(f) and 4(2)(j) of O. 34 of the RHC are *ultra vires* the Evidence Act and the common law. For privilege to be overridden, there must be Parliamentary H legislation allowing it.

(3) The Chief Judge (Malaya) had no power to suspend the application of O. 25 RHC by way of issuing Practice Direction No. 1 of 2001. The suspension of any provision of the RHC may be effected only by the Rules Committee I

(4) Order 25 r. 8(5)(b) RHC remains in effect notwithstanding the provisions of O. 34 r. 4(2)(f) RHC.

(5) In view of the provisions or O. 25 r. 8(5)(b) of the RHC, and the privilege existing at common law and as provided in the Evidence Act, discovery of experts' reports cannot be ordered in a medical negligence action.

(6) The RHC cannot be used at pre-trial case management to bar a trial judge from taking relevant and admissible evidence from an expert.

(7) An expert may give oral evidence at trial without his privileged expert report being tendered or disclosed in advance. An expert witness does not become a non-competent witness merely because his privileged report has not been disclosed by the litigant to the adverse party and to the court before trial.

(8) By O. 35A of the RHC, no order for giving evidence-in-chief by affidavit or witness statements may be made without the agreement of all the parties to the action. However, O. 35A RHC is void as it is inconsistent with s. 138(1) of the Evidence Act and s. 15 of the Courts of Judicature Act 1964.

(9) Witnesses must be examined orally and in open court before the trial judge. The recording of evidence is a judicial function. It cannot be delegated to anyone.

(10) There is no provision in any statute to compel a witness to give a witness statement to a party or his solicitors before trial.

(11) The Evidence Act does not apply to affidavits presented to any court.

(12) It would be wrong for counsel or his clerk to act as the interpreter for a witness. It would also be wrong of the court to use the services of an interpreter engaged by a party. The interpreter must be engaged by the court.

Case(s) referred to:

Anderson v. Bank of British Columbia [1876] 2 Ch D 644 ***(refd)***

Attorney-General v. Brown [1920] 1 KB 773 ***(refd)***

Barnard & Ors v. National Dock Labour Board & Anor [1953] 1 All ER 1113 ***(refd)***

Broadcasting Corp of New Zealand v. Wilson & Horton Ltd [1991] 1 NZLR 335 ***(refd)***

Carlson v. Townsend [2001] 62 BMLR 50 ***(refd)***

Canadian Broadcasting Corpn v. Cordeau [1979] 101 DLR (3d) 24 ***(refd)***

Causton v. Mann Egerton (Johnsons) Ltd [1974] 1 All ER 453 ***(refd)***

Cheong See Leong v. PP [1948-49] MLJ Supp 56 ***(refd)***

Comfort Hotels Ltd v. Wembley Stadium Ltd [1988] 3 All ER 53 ***(refd)***

Curtis v. Beaney [1911] P 181 ***(refd)***

Davie v. Edinburgh Magistrates [1953] SC 34 ***(refd)***

Dr Soo Fook Mun v. Foo Fio Na & Anor and Another Appeal [2001] 2 CLJ 457 CA ***(refd)***

Dubai Bank v. Galadari (No 7) [1992] 1 All ER 658 ***(refd)***

Ex p Pater [1864] 5 B & S 299 ***(refd)***

Far East Food Industries Sdn Bhd v. PT Anekapangan Dwitama [1997] 3 MLJ 805 ***(refd)***

Fulker v. Fulker [1936] 3 All ER 636 ***(refd)***

G10 Personal Investment Services Ltd v. Liverpool and London Steamship Protection and Indemnity Association Ltd [1999] 1 WLR 984 ***(refd)***

General Council of Medical Education And Registration Of The United Kingdom v. Spackman [1943] 2 All ER 337 ***(refd)***

Gopessure v. Bisessure 16 CWN 265 ***(refd)***

Guardian Royal Exchange Assurance of New Zealand Ltd v. Stuart [1985] 1 NZLR 596 ***(refd)***

Learoyd v. Halifax Banking Co [1893] 1 Ch 686 ***(refd)***

Liew Chin Yoong v. PP [1971] 1 MLJ 127 ***(refd)***

Lowden v. Blakey [1889] 23 QBD 332 ***(refd)***

Lyell v. Kennedy (No 3) [1884] 27 Ch D 1 ***(refd)***

Mander v. Evans [2001] 1 WLR 2378 ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***

Morris v. Crown Office [1970] 2 QB 114 ***(refd)***

Mostyn v. West Mostyn Coal and Iron Co, Bristol Corp v. Cox [1884] 26 Ch D 678 ***(refd)***

Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***

National Chemsearch Corpn (SEA) Pte Ltd & Anor v. Hotel Ambassador (Malaysia) Sdn Bhd [1975] 2 MLJ 193 ***(refd)***

Omychund v. Barker [1745] 1 Atk 21 ***(refd)***

Oxfordshire County Council v. M & Anor [1994] 2 All ER 269 ***(refd)***

Parashuram Detaran Shamdasani v. King – Emperor [1945] AC 264 ***(refd)***

Phang Moh Shin v. Commissioner Of Police & Ors [1967] 2 MLJ 186 ***(refd)***

Quinn v. Leathem [1901] AC 495 ***(refd)***
R v. Beezley [1830] 4 C & P 220 ***(refd)***
R v. Dunning [1979] 50 CC (2d) 296 ***(refd)***
R v. Lefroy [1873] LR 8 QB 134 ***(refd)***
R v. M'Naghten [1844] 10 C1 & F 200 ***(refd)***
R v. Metal Trades Employers' Association, ex p Amalgamated Engineering Union Australian Section [1950-51] 82 CLR 208 ***(refd)***
R v. Roncoli [1998] Crim LR 584 ***(refd)***
R v. Secretary of State for the Home Department, ex p Leech [1993] 4 All ER 539 ***(refd)***
R v. Sharp [1993] 3 All ER 225 ***(refd)***
R v. Sweet-Escott [1971] 55 Cr App R 316 ***(refd)***
Rahman v. Kirklees Area Health Authority [1980] 3 All ER 610 ***(refd)***
Re Grosvenor Hotel, London (No 2) [1964] 3 All ER 354 ***(refd)***
Re Hallett's Estate Knatchbull v. Hallett [1880] 13 Ch D 696 ***(refd)***
Re Regina and Monette [1975] 64 DLR (3d) 470 ***(refd)***
Roe v. Ministry of Health [1954] 2 All ER 131 ***(refd)***
Schneider v. Leigh [1955] 2 All ER 173 ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(refd)***
Smith v. Harris [1939] 3 All ER 960 ***(refd)***
Stevens v. Simons [1988] CLY 1161 ***(refd)***
Tameshwar & Anor v. Reginam [1957] 2 All ER 683 ***(refd)***
Tan Boon Chee, David v. Medical Council Of Singapore [1980] 2 MLJ 116
The Hontestroom [1927] AC 37 ***(refd)***
Turquand v. Board of Trade [1886] 11 App Cas 286 ***(refd)***
UMBC Finance Ltd v. Woon Kim Yan Robin [1991] 1 CLJ 40; [1991] 1 CLJ (Rep) 471 SC ***(refd)***
Ventouris v. Mountain (The Italia Express) [1991] 1 WLR 607 ***(refd)***
Ventouris v. Mountain [1991] 3 All ER 472 ***(refd)***
Waugh v. British Railways Board [1980] AC 521 ***(refd)***
Wheeler v. Le Marchant [1881] 17 Ch D 675 ***(refd)***
Whitehouse v. Jordan & Anor [1980] 1 All ER 650 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 15
Criminal Procedure Code, ss. 3, 399(2)(b)
Evidence Act 1950, ss. 2, 45, 46, 73A(3), 118, 126, 136(1), 138(1), (2)
Interpretation Acts 1948 and 1967, ss. 22, 23(1)
Oaths and Affirmations Act 1949, s. 6
Rules of the High Court 1980, O. 24 rr. 12, 13(1), (2), O. 25 r. 8(5)(b), O. 34 rr. 4(2)(f), (j), 6, 7, O. 35A rr. 1, 2, O. 38 rr. 1, 2, 4

Civil Evidence Act 1972 [UK], ss. 2(3), 3
Civil Evidence Act 1995 [UK], s. 2(1)
Civil Procedure Act 1997 [UK], s. 2

A Civil Procedure Rules 1998 [UK], rr. 1, 1.4, 22.1, 22.2, 22.3, 22.4, 32.2, 32.4, 32.12(2), 32.13, 32.14, 32.15, 35.1, 35.3, 35.4, 35.7, 35.8, 35.9, 35.10(3), (4)
Evidence Act [India], s. 118
Prison Act 1952 [UK], s. 47(1)

B **Other source(s) referred to:**
Access to Justice, Final Report, HMSO (1996), p 130
Halsbury's Laws of England, 4th edn, vol 17, p 23
Halsbury's Laws of England, 4th edn, vol 37, para 452, p 340
Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process,* p 285
C John Basten, *The Court Expert in Civil Trials, a Comparative Appraisal,* [1977] 40 MLR 174
Malaysian Court Practice, Practitioner's edn, pp 316, 317
Malaysian High Court Practice, 2003 Desk edn, p 1248
Michael A Jones, *Medical Negligence,* p 844
Sarkar's Law of Evidence, vol 1, pp 881, 883
D *Sarkar's Law of Evidence,* vol 2, pp 1954, 2051
Suzanne McNicol, *Law of Privilege,* pp vii, 1, 21, 33-350
Taylor Treatise on the Law of Evidence, 12th edn, p 59
The Supreme Court Practise, 1997, vol 1, Part 1, pp 434, 653

E *For the plaintiff - PS Ranjan (Manmohan S Dhillon with him); M/s PS Ranjan & Co*
For the 1st defendant - Sagadaven Thangavelu; M/s Shearn Delamore & Co
For the 2nd defendant - Felix Raj; M/s Shaikh David Raj

F

JUDGMENT

Abdul Malik Ishak J:

Introduction

G

[1] I case managed this case for trial and I vigorously applied O. 34 r. 4(2)(f) of the Rules of the High Court 1980 ("RHC") and O. 35A r. 1 and r. 2 of the RHC. Briefly, I ordered the parties to furnish the reports of their medical experts and to
H deliver their medical experts' reports by the next case management date. I too ordered the parties to prepare and exchange their witnesses statements in affidavit forms which must necessarily include the witnesses statements of their medical experts.

[2] The parties were most unhappy with my case management
I directions. They now sought to convince me that in so far as their medical experts were concerned, they should be given a free hand

to decide whether they should furnish and deliver their medical experts' reports and, consequently, they ought not to be directed to prepare and exchange the witnesses statements of their medical experts. They preferred their medical experts to be subpoenaed and to attend court in order to testify and tender their medical reports. They preferred the conventional method.

[3] I am mindful that the orders of this court should be obeyed by the parties. Any interruption of the trial process constitutes a serious and direct threat to the administration of justice. It is an accepted law and it is the law that the court has the power to punish as contempt of court any party who interrupts the trial process. It is an inherent power that cannot be taken away by statute (*Ex p Pater* [1864] 5 B & S 299; *R v. Lefroy* [1873] LR 8 QB 134; *Re Regina and Monette* [1975] 64 DLR (3d) 470 at 474; *R v. Dunning* [1979] 50 CC (2d) 296; *Canadian Broadcasting Corpn v. Cordeau* [1979] 101 DLR (3d) 24; and *R. v Metal Trades Employers' Association, ex p Amalgamated Engineering Union Australian Section* [1950-51] 82 CLR 208, 241-3). In the words of the great judge by the name of Lord Denning MR in *Morris v. Crown Office* [1970] 2 QB 114 at 122, [1970] 1 All ER 1079 at 1081:

> The phrase 'contempt in the face of the court' has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it, strike at the very foundations of our society. To maintain law and order, the judges have, and must have power at once to deal with those who offend against it. It is a great power – a power instantly to imprison a person without a trial – but it is a necessary power.

[4] Over the years, I have always exercised caution and will not exercise my contempt powers on the spur of the moment. Lord Goddard CJ in *Parashuram Detaran Shamdasani v. King – Emperor* [1945] AC 264 at 270 (PC) had this to say of the contempt power:

> ... a power which a court must, of necessity, possess; its usefulness depends upon the wisdom and restraint with which it is used ...

[5] I was attracted by the legal arguments of the parties and I proceeded forthwith and listened to their arguments in regard to the legal ramifications of O. 34 r. 4 (2)(f) of the RHC and O. 35A r. 1 and r. 2 of the RHC. I must express my gratitude to the counsel on all sides who have submitted well and so, indirectly, assisted in the development of the law in this country. I was prepared to vary the directions which I gave when I first case managed this case and this was certainly permissible under r. 6 of O. 34 of the RHC.

[6] For convenience, I shall now reproduce these two provisions of the RHC. Order 34 r. 4(2)(f) of the RHC state as follows:

Order 34

Pre-trial Case Management

4 First pre-trial conference (O. 34 r. 4)

(1) Where the parties to an action appear in person or by an advocate on the return date appearing in form 63 (hereinafter referred to as 'the first pre-trial conference'), then the Judge to whom the action has been assigned shall, after conferring with them, make such orders and give such directions as to the future conduct of the action to ensure its just, expeditious and economical disposal.

(2) Without prejudice to the generality of the provision of paragraph (1), the Judge may:

(f) order either party to the action to furnish the report of an expert and fix the time for the delivery of such report.

[7] And O. 35A r. 1 and r. 2 of the RHC state as follows:

Order 35a

Witness Statement

Evidence in chief by way of affidavit (O. 35A, r. 1)

1. Where the parties agree, the Court may allow any witness in an action commenced by writ to give his evidence in chief by way of affidavit tendered and read at the hearing before the witness is cross-examined on his affidavit.

Copy of affidavit to be furnished to the other party (O. 35A r. 2)

2. A copy of each affidavit tendered and read shall be furnished to the other party.

[8] I am told that I would be breaking new grounds in deciding these two issues. But, whether this decision would survive the test of time is yet to be seen. Only time will tell. Nathaniel Hawthorne in "The Marble Faun" once remarked that:

> Time flies over us, but leaves its shadow behind.

[9] Shakespeare, in Macbeth 1, said:

> Come what come may, Time and the hour runs through the roughest day.

[10] What Hector Berlioz said as quoted in Almanach des lettres francaises is quite interesting. There he said:

> Time is a great teacher, but unfortunately it kills all its pupils.

[11] I will now proceed to the heart of the matter.

The First Issue – The Production And Exchange Of The Medical Reports

[12] There was an outcry. Why compel production of an expert's report before trial in a country where there is no right of pre-trial access to medical records and documents in the hands of unrelated parties, contrary to the position in Britian, and therefore results in inadequately prepared expert's report before trial? I was asked to be wary. I was asked to tread cautiously and not to ruffle the feathers.

[13] In Britian, the Civil Evidence Act 1968, the Civil Evidence Act 1972 and the Courts and Legal Services Act 1990 are enabling Parliamentary legislations allowing for rules of court to be made for pre-trial disclosure of experts' reports provided the experts were intended to be called at trial. There is no rule of law in Malaysia, unlike in Britian, that a witness' oral evidence at the trial, whether opinion evidence or otherwise, cannot be given, even in a criminal case, unless the witness first gives a written statement of it for the purpose of advance disclosure to the court and to the other parties. In fact, there is no Malaysian equivalent to the British Parliamentary legislations like the Civil Evidence Act 1968, the Civil Evidence Act 1972 and the Courts and Legal Services Act 1990. In Britian, following such enabling

Parliamentary legislations, the English Rules were amended to provide for pre-trial discovery of reports of experts intended to be called at the trial.

[14] In essence, the material parts of s. 2(3) of the Civil Evidence Act 1972 are worded in this way:

> Notwithstanding any enactment or rule of law by virtue of which documents prepared for the purpose of pending or contemplated civil proceedings or in connection with the obtaining or giving of legal advice are in certain circumstances privileged from disclosure, provision may be made by rules of court:
>
> (a) for enabling the court … to direct … that the parties … disclose to the other or others in the form of one or more expert reports the expert evidence … which he proposes to adduce as part of his case at the trial; and
>
> (b) for prohibiting a party who fails to comply with a direction given … from adducing in evidence … except with the leave of the court, any statement … contained in any expert report … .

[15] As can be seen, s. 2(3) of the Civil Evidence Act 1972 is unique. It gives the Rule Committee in Britian the power to make rules regarding discovery of otherwise privileged experts' reports, but only where the experts are intended to be called at the trial. We must not blindly follow the English Acts of Parliament and the Rules made thereunder especially when we, in Malaysia, do not have the equivalent provisions to apply.

[16] We are an independent sovereign nation. We gained our independence years ago. In Malaysia, experts' reports are privileged, even if made in anticipation of a claim. The same would apply to statements made by lay witnesses to litigants and their solicitors for the purpose of the litigation. I must categorically say that legal professional privilege attaching to experts' reports is a basic and fundamental common law right which is affirmed by an Act of Parliament in the form of our own s. 126 of the Evidence Act 1950. That section enacts as follows:

> **126. Professional communications.**
>
> (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has

become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure:

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

Explanation – The obligation stated in this section continues after the employment has ceased.

ILLUSTRATIONS

(a) A., a client, says to B., an advocate: "I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose this communication is protected from disclosure.

(b) A., a client, says to B., an advocate: "I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

This communication being made in furtherance of a criminal purpose is not protected from disclosure.

(c) A., being charged with embezzlement, retains B., an advocate, to defend him. In the course of the proceedings B. observes that an entry has been made in A's account-book, charging A. with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B. in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

[17] *Sarkar's Law Of Evidence*, vol. 2, at p. 2051 carries the following write-ups and it merits reproduction:

> Oral or documentary information from third persons, which has been called into existence by the solicitor, (or by his direction, even though obtained by the client for the purposes of litigation, eg, information to be embodied in proofs of witnesses; reports made by medical men at the request of the solicitors of a railway company, as to the condition of a person threatening to sue the company for injury from a collision (*Wooley v. NL* Ry, LR 4 CP 602; *Friend v. LC & D Ry*, 2 Ex D 437); reports by servant of company made for use of the company's solicitor and in reasonable apprehension of a claim against the company (*Collins v. London G O Co*, 68 LT 831) are privileged (*Phip* 11th Ed p 258).

[18] The then Federal Court speaking through Wan Suleiman FJ in *National Chemsearch Corpn. (S.E.A.) Pte. Ltd. & Anor. v. Hotel Ambassador (Malaysia) Sdn. Bhd.* [1975] 2 MLJ 193, 198, aptly said:

> At page 248 of his judgment, his Lordship remarked 'In this connection, I refer to the application by counsel for the defendants for the production by the plaintiffs of the report of Kellaway of the I.A.C. It was learned counsel's contention that the time of his making the request when his own witness (DW4) was giving evidence was the right and proper moment. Production was objected to on the ground of privilege. Kellaway was not a party to the action and I had no evidence that he was an expert. I upheld the objection but there was an earlier report of Kellaway which was in the possession of the defence, and which being a near contemporaneous document was perhaps the more pertinent.'
>
> Kellaway made two reports. The first of these, a copy of which is in the possession of the appellants. It is the 2nd report, the non-production of which by respondents, counsel for appellants submits, justify the operation of the presumption under section 114(g) of the Evidence Act against them. In respect of this report, the respondents have filed an affidavit at the trial stating that it has been called into existence for the purpose of litigation, and was therefore privileged. That this report is privileged there can be no doubt. (See *Phipson on Evidence* – 10th. Edition paragraph 604).

[19] Old vintage English cases should be referred to. They serve as useful guidelines. Thus, according to *Learoyd v. Halifax Banking Co.* [1893] 1 Ch. 686, 690 that documents obtained by a solicitor

with a view to enable him to prosecute or defend an action, or give advice with reference to existing or comtemplated litigation are considered privileged. Cotton LJ said in *Wheeler v. Le Marchant* [1881] 17 Ch. D 675, 685 that documents prepared confidentially after a dispute has arisen between the plaintiff and the defendant, and for the purpose of obtaining information, evidence or legal advice with reference to litigation existing or contemplated between the parties to an action are considered privileged. Cases like *Mostyn v. West Mostyn Coal and Iron Co., Bristol Corp. v Cox* [1884] 26 Ch. D 678; *Curtis v. Beaney* [1911] P. 181; and *Lowden v. Blakey* [1889] 23 QBD 332 laid down the principles that instructions and briefs to counsel and cases for counsel's opinion and counsels' opinions thereon, and counsel's drafts and notes are considered privileged. Passages appearing in *"The Supreme Court Practice"* 1997, vol. 1, Part 1 at p. 434 merit reproduction and I must be forgiven for reproducing them here:

> The general principle is that documents embodying communications with (including reports to or from) a non-professional servant, agent or third party are privileged if, and only if, coming into existence for the purpose of obtaining legal advice in existing or anticipated proceedings (see the cases summarised in the judgment of Havers J in *Seabrook v. British Transport Commission* [1959] 1 WLR 509, [1959] 2 All ER 15).
>
> The application of this test is easy enough in straightforward cases; privilege will clearly extend to communications for such purposes made to a solicitor through an agent, and to information obtained from a third party at the request of a solicitor to enable him to enforce or resist a claim by legal proceedings. Difficulties arise, however, (a) in determining the status of documents coming into existence for more than one purpose, and (b) in deciding at what stage it can fairly be said any such purpose is obtaining advice in anticipated litigation, as contrasted with obtaining information as to an occurrence which may lead to litigation.
>
> As to (a) a document which is produced or brought into existence where the dominant purpose of its author, or of the person or authority under whose direction (whether particular or general) it is produced or brought into existence, is the use of the document or its contents in order to obtain legal advice, or to conduct or aid in the conduct of litigation in reasonable prospect at the time of its production, is privileged and excluded from inspection (*Waugh v. British Railways Board* [1980] AC 521, [1979] 2 All ER 1169, HL).

A As to (b) the question, which is often closely connected with that raised in (a), is whether it is sufficient that the documents were made against the more or less likely contingency of it becoming necessary to obtain legal advice to make or resist a claim by litigation, or whether there must be an actual, present intention to
B obtain such advice at the time that the documents are made. In answer to this question the Court of Appeal has held that, if litigation is reasonably in prospect, documents brought into existence for the purpose of enabling solicitors to advise whether a claim shall be made or resisted are protected by privilege, whether or not a decision to instruct solicitors has been made at
C the time the documents are brought into being, subject only to the caveat that such purpose is the dominant purpose of their creation (*Re Highgrade Traders Ltd* [1984] BCLC 151, CA; *Guinness Peat Properties Ltd v. Fitzroy Robinson Partnership* [1987] 1 WLR 1027; [1987] 2 All ER 716 CA).

D **[20]** Write-ups in the *"Malaysian Court Practice"*, practitioner's edition at p. 316 to p. 317 also merit reproduction and I shall do so now:

Medical reports Written statements made before any claim has
E been made, or even adumbrated, are privileged from discovery if they are made in anticipation of any claim which may be made: *Parch v. United Bristol Hospitals Board* [1959] 1 WLR 955, [1955] 3 All ER 876, following *Seabrook v. British Transport Commission* [1959] 1 WLR 509, [1959] 2 All ER 15. In an action for
F personal injuries, the plaintiff in *Watson v. Cammell, Laird & Co* [1959] 1 WLR 702, [1959] 2 All ER 757, CA, objected to the production of a copy of the case notes prepared by a hospital where he was attended for treatment. The copy was made by the plaintiff's solicitor to assist in advising the plaintiff in making his claim. It was held that the document was made for the purpose
G of litigation in which the solicitor was acting for the party and accordingly, was privileged.

[21] Going to the Court of Appeal's decision in the case of *Carlson v. Townsend* [2001] 62 BMLR 50, Brooke LJ writing a separate judgment had this to say in regard to the issue of
H privilege attached to medical reports and I gratefully adopt them in this judgment (see p. 57 of the report):

And the common law has always recognised a privilege in communications, such as medical reports in personal injury cases,
I which come into existence when litigation is contemplated, if they have been made with a view to such litigation. In *Causton v. Mann Egerton (Johnsons) Ltd* [1974] 1 All ER 453 at 460, [1974]

1 WLF 162 at 170 Roskill LJ said: A

> 'I am clearly of the view that this court has no power to order production of privileged documents. Medical reports are in no different category from other experts' reports and it would be quite wrong to engraft a qualification on the doctrine of privilege according to the nature of the report or the class of professional qualification attaching to its maker … [So] long as we have an adversary system, a party is entitled not to produce documents which are properly protected by privilege if it is not to his advantage to produce them, and even though their production might assist his adversary if his adversary or his solicitor were aware of their contents or might lead the court to a different conclusion from that to which the court would come in ignorance of their existence.

[22] Roskill LJ in *Causton v. Mann Egerton (Johnsons) Ltd* [1974] 1 All ER 453, CA aptly said at p. 459: D

> In my judgment it is not open to this court to order production of privileged documents against the wish of the party claiming privilege.

E

[23] All these would add mileage to the arguments for the non-production of medical reports before the trial, something which the parties had hoped for during their submissions.

[24] Reverting back to the provisions of the RHC, I need to highlight O. 34 r. 4(2)(f) of the RHC. With respect, if this order and this rule is supposed to mean that privilege has been abolished then it must be held to be ultra vires the Evidence Act 1950 and contrary to the basic and fundamental common law right of privilege affirmed by the Evidence Act 1950. Privilege cannot be taken away by subsidiary legislation in the form of the RHC. Put differently, subsidiary legislation such as the RHC cannot take away the privilege that has been entrenched. It is an apt observation to make that the Rules Committee in Malaysia has no power to make rules altering the law of evidence. If authority is required for this simple proposition of the law, reference to the case of *Re Grosvenor Hotel, London (No. 2)* [1964] 3 All ER 354, a decision of the Court of Appeal with a coram of Lord Denning MR, Harman and Salmon LJJ, should be made. There Lord Denning MR, writing a separate judgment, had this to say at p. 360 of the report: F G H I

> What then are the powers of the Rules Committee? They can make rules for regulating and prescribing the procedure and practice of the court, but they cannot alter the rules of evidence, or the ordinary law of the land. The law as to Crown privilege is not mere procedure or practice. It may perhaps be said to be a rule of evidence, but I would rank it higher. It is a principle of our constitutional law which is to be observed in the administration of justice, not only when a witness is called to give oral evidence, but also when a party is called on to give discovery. See what Viscount Simon, LC, said about it in *Duncan v. Cammel Laird & Co., Ltd.* [1942] 1 All ER 587 at pages 594, 595; [1942] AC 624 at pages 641, 642. Suppose the Rules Committee purported to abolish Crown privilege altogether. I should have thought that it was quite beyond their powers.

[25] In a book entitled *"Medical Negligence"* by Michael A. Jones, the learned author at p. 844 of the book wrote:

> Moreover, given that privilege is a matter of substantive law, indeed a fundamental right, it is difficult to see how rules of procedure can abrogate the client's privilege (*General Mediterranean Holdings SA v. Patel* [2000] 1 WLR 272; and *Linstead v. East Sussex, Brighton and Hove Health Authority* [2001] PIQR P 356).

[26] In *R v. Secretary of State for the Home Department, ex parte Leech* [1993] 4 All ER 539, the Court of Appeal was faced with a question of whether the Prison rule enabling the governor to read and stop the prisoner's correspondence with the legal adviser in respect of contemplated proceedings was *ultra vires* s. 47(1) of the Prison Act 1952. Steyn LJ writing for the Court of Appeal observed at p. 549 of the report:

> It follows that s. 47(1) does not authorise the making of any rule which creates an inpediment to the free flow of communications between a solicitor and a client about contemplated legal proceedings. This too is a rule of fundamental importance.

[27] Continuing at p. 550 of the report, Steyn LJ said:

> Legal professional privilege is therefore based on an important auxiliary principle which serves to buttress the cardinal principles of unimpeded access to the court and to legal advice.
>
> It is not without significance that counsel could not refer us to a single instance where subordinate legislation was employed, let alone successfully employed, to abolish a common law privilege where the enabling legislation failed to authorise the abolition expressly. Parliament has frequently abolished the common law

> privilege against self-incrimination by primary legislation (see s. 236 of the Insolvency Act 1986, s. 2 of the Criminal Justice Act 1987 and s. 72(1) of the Supreme Court Act 1981). When the provision for mutual disclosure of experts' reports was introduced, it was feared, wrongly, we suggest, that such a provision might interfere with legal professional privilege. Accordingly, the necessary rule change was expressly authorised by s. 2(3) of the Civil Evidence Act 1972. Subsequently, when the rule providing for exchange of witnesses' statements was introduced, it was done by a simple rule change. It was then argued that the new rule was *ultra vires* as interfering with legal professional privilege. In *Comfort Hotels Ltd v. Wembley Stadium Ltd* [1988] 3 All ER 53 at 57, [1988] 1 WLR 872 at 876 Hoffmann J dismissed this challenge on the ground that a mere procedural change was involved which did not interfere with the privilege. He described the privilege as 'a strong one' and it is clear from his judgment that he would have held the new rule *ultra vires* if it had interfered with legal professional privilege. These conditions do not by themselves provide the answer to the question before us but they do serve to underline the difficulties in the way of the submission that s. 47(1) authorises by necessary implication r. 33(3) as we have interpreted it. It will be a rare case in which it could be held that such a fundamental right was by necessary implication abolished or limited by statute. It will, we suggest, be an even rarer case in which it could be held that a statute authorised by necessary implication the abolition or limitation of so fundamental a right by subordinate legislation.

[28] By way of a conclusion, Steyn LJ rightly held that (see p. 555 of the report):

> But r. 33(3) is extravagantly wide. The very technique of dealing in one provision with ordinary correspondence and legal correspondence is flawed. In our view the Secretary of State strayed beyond the proper limits of s. 47(1) when he made r. 33(3). We would allow the appeal and grant a declaration the (?that) r. 33(3) is *ultra vires* so far as it purports to apply to correspondence between prisoners and their legal advisers.

[29] Again, on the issue of privilege, reference should be made to the speech of Hoffmann J in the case of *Comfort Hotels Ltd v. Wembley Stadium Ltd (Silkin and others, third parties)* [1988] 3 All ER 53, especially to p. 56 to p. 57 of the report. This was what his Lordship said:

There is no doubt that a party has a privilege which entitles him to refuse to disclose, whether by way of discovery or in oral evidence, the statements which have been made to him by potential witnesses or other persons for the purposes of litigation. Two examples of the operation of that privilege in relation to reports received from experts may be cited. In *Re Saxton (decd)* [1962] 2 All ER 618, [1962] 1 WLR 968 an application was made to Wilberforce J for the production of a document alleged to contain a forged signature, so that it could be examined by an expert. The judge granted the application but subject to a condition that the expert's report should be disclosed to the other side. The Court of Appeal held that the judge was not entitled to impose that condition (see [1962] 3 All ER 92, [1962] 1 WLR 968). The party to whom the report had been communicated was entitled to treat the document as privileged and not disclose it to the other side. That privilege could not be overridden by an order of the court.

In *Causton v. Mann Egerton (Johnsons) Ltd* [1974] 1 All ER 453, [1974] 1 WLR 162 a plaintiff who was suing for personal injuries had disclosed the medical reports obtained from his experts. The defendant had had the plaintiff examined by its own expert but refused to disclose his report. The plaintiff's application for disclosure was unsuccessful.

[30] Kennedy LJ writing a separate judgment in the case of *Oxfordshire County Council v. M and Another* [1994] 2 All ER 269, CA, sets out the law as regards privilege in this way (see p. 282 to p. 283 of the report):

Normally in civil litigation conducted on adversarial lines a medical report obtained by one party is privileged. The party need only disclose it if he or she wishes to call the particular witness. However, if the party desiring to obtain a medical report needs the assistance of another party, or in this instance of the court, that other party or the court, as it seems to me, may take it a condition of providing the necessary assistance that the report when obtained shall be disclosed. I, for my part, see nothing in the leave provisions of the statute which makes that course objectionable. That approach received some approval from the Court of Appeal in *Causton v. Mann Egerton (Johnsons) Ltd* [1974] 1 All ER 453 at 458, [1974] 1 WLR 162 at 168, where Lord Denning MR, although in the minority, said:

> … I hope that in future the solicitors for every plaintiff will refuse to allow any defendants to have any medical examination of the plaintiff except on the terms that the defendants will disclose the medical reports following the examination.

Stamp LJ, in majority, said ([1974] 1 All ER 453 at 458, [1974] 1 WLR 162 at 168):

> However desirable it may be that there should be agreements between the parties for the disclosure and exchange of such documents, in the absence of an agreement or waiver of the privilege which would otherwise attach to them, they remain in my judgment privileged.

That was the route by which he came to the conclusion at which he arrived. But it will be noted that he, like Lord Denning MR, countenanced the possibility of there being such an agreement or waiver. In effect, that is, as it seems to me, what happened in this case. Judge Paul Clark made his order, as it happened, by consent. The order was in the form that the report, when obtained, should be disclosed. The parties went back before Judge Harold Wilson in order to delete the requirement of disclosure. It seems to me that in the context of the Children Act 1989 it is quite impossible to say that the conclusion at which Judge Harold Wilson arrived was in any way erroneous. He was entitled to maintain, as he did, that if this report was to be produced, which required the leave of the court in order to allow access to documents and video tape recordings, then the condition should be imposed which he imposed. Accordingly, for somewhat different reasons to those ventilated so far, I arrive at the conclusion that this appeal must be dismissed.

[31] All said and done, and taken in its correct perspective, s. 23 of the Interpretation Acts 1948 and 1967 (Act 388) must be put in the forefront. That section enacts as follows:

> **23. Avoidance of subsidiary legislation in case of inconsistency with Act.**
>
> (1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.
>
> (1A) For the purposes of subsection (1), any subsidiary legislation made under an Act is not inconsistent with that Act or any other Act merely by reason of the absence in the Act under which it is made of any provision relating to the commencement, application, operation, interpretation or

A construction of the subsidiary legislation or to any other matter in connection with such subsidiary legislation if provisions relating to the commencement, application, operation, interpretation or construction of, or other matter in connection with, subsidiary legislation generally are contained in this Act.

B

(2) In this section 'Act' includes a federal law styling itself an Ordinance or Enactment.

[32] It is now clear and it is beyond peradventure that any C subsidiary legislation that runs counter to an Act of Parliament would be rendered void.

[33] It was pointed out that by virtue of s. 136(1) of the Evidence Act 1950, the court shall admit only relevant evidence. And flowing from that it was argued that a judge cannot at an D interlocutory stage play the role of a trial judge and make an order that a witness shall be barred from giving evidence at the trial because of the claim to privilege over his statement. It was also argued that the questions of who is competent to testify at the trial and whether an expert evidence is admissible are matters for E the trial judge and not the judge who hears the interlocutory application or the judge who conducts the case management. It was also argued that the trial judge has the power, in certain circumstances, to refuse to take evidence. Of course, it would be ideal if there are enough judges to perform separate tasks in the F civil divisions of the High Courts at Wisma Denmark. As the situation now stands, the same judge would be performing three separate tasks and wears, literally speaking, three hats at the same time:

G (1) be a case management judge;

(2) be the judge that hears the interlocutory application; and

(3) be the judge that hears the trial of the action.

H **[34]** Incidentally, all the High Court Judges at Wisma Denmark perform these three tasks daily. Three in one, just like an instant coffee, so to speak. Be that as it may, by virtue of s. 118 of Evidence Act 1950, all persons shall be competent to testify. In its full text, that section enacts as follows:

I

118. Who may testify.

All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

[35] *Sarkar's Law of Evidence*, vol. 2, at p. 1954 contains a very good commentary of s. 118 of the Indian Evidence Act which is in *pari materia* to ours. There the learned authors wrote:

> Under s. 118, all persons are competent to testify, unless the court considers that by reason of tender years, extreme old age, disease, or infirmity, they are incapable of understanding the questions put to them and of giving rational answers. All grounds of incompetency have been swept away by this section, under which competency of witnesses is the rule and their incompetency is the exception. In civil or criminal proceedings the husband or wife of a party is also a competent witness (s. 120). The effect of s. 118 is to make the husband witness for all purposes, eg, to prove non-access (*Howe v. Howe*, 38 M 466: 25 MLJ 594 – Contra: *Sweeney v. S*, 62 C 1080. As to this see ante; "*Evidence of Parents to Prove Access or Non-access During Marriage & c*"). Act 2 of 1855 s 14, limited incompetency to children and lunactics incapable of giving evidence. This section has enlarged the discretion of the Judge as to cases of incompetency; and does not recognise any, save that of an intellectual character.

[36] It was argued that a pre-trial order for discovery of experts' reports made during pre-trial case management will tie the hands of the trial judge and the parties in that if the experts' reports are not disclosed before trial then the experts cannot give evidence at all, no matter how relevant and weighty that evidence might be, and this is so even if the trial judge or the parties want the experts to testify. What would the trial judge do if any party fails to comply with the direction of the trial judge during the pre-trial case management? The answer lies in r. 7 of O. 34 of the RHC wherein the trial judge may make such order against the defaulting party "as meets the ends of justice". But can the court compel the parties to produce their experts' reports in the face of the defence of privilege? The parties here ventured an answer in the negative because the principle of the legal professional privilege attaching to experts' reports has been the basic and fundamental common law right which has been affirmed by s. 126 of the Evidence Act 1950. To appreciate the subtlety behind this

argument one must remember that the parties cannot compel the experts they consult to reduce their opinions into writing for disclosure to the other parties. It must be borne in mind that there is no provision in Malaysian law to compel a witness to produce, before trial, a written statement of his evidence. A person may only be compelled by subpoena to attend court and to give oral evidence and produce non-privileged documents in the course of the trial. The defendants have the inherent right not to present evidence until the close of the plaintiff's case. That inherent right would be jeopardised and whittled away by requiring the defendants, before trial, to disclose their evidence, namely their experts' reports. Order 35 r. 4 (4) of the RHC states as follows:

> **4 Order of speeches (O. 35 r. 4)**
>
> (4) If the defendant elects to adduce evidence, he may, after any evidence on behalf of the plaintiff has been given, open his case and, after the evidence on his behalf has been given, make a second speech closing his case, and at the close of the defendant's case the plaintiff may make a speech in reply.

[37] It simply means that if the defendant elects to adduce evidence, the defendant may after any evidence on behalf of the plaintiff has been given, open the defendant's case. That is the inherent right of the defendant.

[38] At this juncture, I should refer to O. 34 r. 4(2)(j) of the RHC. It states as follows:

> (2) Without prejudice to the generality of the provision of paragraph (1), the Judge may:
>
> (j) subject to all just exceptions as to privilege, direct the parties to make any disclosure or provide any information which the Judge considers relevant to the issues in the action.

[39] Now, since the phrase "subject to all just exceptions as to privilege" is preserved, one can readily conclude that privilege cannot be taken away by the Rules in the form of the RHC. The RHC must be read subject to the Evidence Act 1950. There is no enabling Parliamentary legislation in Malaysia removing the privilege. Moreover, the entire RHC must be read as a whole. According to Lord Blackburn in *Turquand v. Board of Trade* [1886] 11 App. Cas. 286 that a statute must be regarded as a whole in that the construction to be attached to the statute must be made by looking at all the parts of the statute together and not by

looking at one part only by itself. This was also the approach adopted by Sankey J, in *Attorney-General v. Brown* [1920] 1 KB 773.

[40] I have reproduced O. 34 r. 4(2)(f) of the RHC and I must emphasise on the words "either party" that appear therein. These words do not provide, unlike in Britian, for mutual, equal and simultaneous discovery of experts' reports. So these words can only apply to experts' reports where privilege has been waived by "either party" and these words too must be read subject to para. (j) of O. 34 r. 4(2) of the RHC especially the words "subject to all just exceptions as to privilege". Incidentally, O. 25 r. 8(5)(b) of the RHC makes an inroad when it expressly excludes medical negligence cases from the class of cases in which it is stated that there is a duty to disclose experts' reports. I will now reproduce O. 25 r. 8(5)(b) of the RHC in order to appreciate what I have said:

> (5) This rule applies to any action for personal injuries except:
>
> (b) any action where the pleadings contain an allegation of a negligent act or omission in the course of medical treatment.

[41] It must be emphasised that the Rules Committee retains O. 25 of the RHC. That order provides for summons for directions and it is still in force. It has not been deleted. But unfortunately, O. 25 of the RHC has been suspended from operating by a Practice Direction No: 1 of 2001 issued by the Honourable Chief Judge of Malaya. The Practice Direction, in its original text, reads as follows:

> Arahan Amalan Bil. 1 tahun 2001
>
> Penangguhan Pemakaian Aturan 25
>
> Kaedah-Kaedah Mahkamah Tinggi 1980
>
> Dengan hormatnya perkara di atas dirujuk.
>
> 2. Dimaklumkan bahawa hasil dari perbincangan dengan YA.-YA Hakim dan Pesuruhjaya Kehakiman Mahkamah Tinggi di Persidangan Tahunan Majlis Hakim-Hakim 2001 mengenai pemakaian Aturan 25 Kaedah-Kaedah Mahkamah Tinggi 1980, YAA Hakim Besar Malaya telah mengambil maklum tentang keputusan mesyuarat yang telah bersetuju untuk menggantung pemakaian Aturan 25 Kaedah-Kaedah Mahkamah Tinggi 1980.

3. Sehubungan itu YAA Hakim Besar Malaya mengarahkan supaya pemakaian Aturan 25 Kaedah-Kaedah Mahkamah Tinggi 1980 digantung sehingga satu keputusan mengenai kajian terhadap aturan tersebut dibuat. Dengan penggantungan tersebut, ini bermakna Aturan 25 tidak lagi digunakan sebaliknya Aturan 34 Kaedah-Kaedah Mahkamah Tinggi 1980 hendaklah digunakan keseluruhannya di dalam pengurusan kes.

4. Bagi tujuan pemfailan notis untuk menghadiri pengurusn kes (pre-trial case management) Borang 63 yang baru hendaklah digunakan dan fee yang dikenakan bagi Borang 63 ialah sebanyak RM8.00 (Butiran 64 Appendix B Kaedah-Kaedah Mahkamah Tinggi 1980).

5. Semua Pejabat Pendaftaran Mahkamah Tinggi Malaya dikehendaki tidak menerima pemfailan dokumen-dokumen di bawah Aturan 25 Kaedah-Kaedah Mahkamah Tinggi 1980 kecuali saman minta arahan yang berkaitan dengan tanah di bawah seksyen 257 Kanun Tanah Negara 1965.

6. Arahan YAA Hakim Besar Malaya ini adalah dibuat dalam menjalankan kuasa-kuasa di bawah Aturan 92 Kaedah 3B Kaedah-Kaedah Mahkamah Tinggi 1980 setelah mendapat persetujuan YAA Ketua Hakim Negara dan berkuatkuasa mulai dari tarikh Arahan Amalan ini dikeluarkan.

t.t.
Pendaftar
Mahkamah Tinggi Malaya
Kuala Lumpur
19 Jun 2001.

[42] It was argued that the Honourable Chief Judge of Malaya cannot suspend the operation of O. 25 of the RHC by way of a practice direction as was done in 2001, to be precise on 19 June 2001. But, with respect, O. 92 r. 3B of the RHC gives the necessary power to the Honourable Chief Judge of Malaya after consulting the Honourable Chief Justice of Malaysia to issue such practice directions as may be necessary for the better carrying out or giving effect to the provisions of the RHC. The suspension of O. 25 of the RHC does not make it obsolete nor does it whittle away the rigours of r. 8 of O. 25 of the RHC which states as follows:

8 Automatic direction in personal injury action (O. 25 r. 8)

(1) When the pleadings in any action to which this rule applies are deemed to be closed the following directions shall take effect automatically:

(a) there shall be discovery of documents within 14 days in accordance with Order 24 rule 2, and inspection within seven days thereafter, save that where liability is admitted, or where the action arises out of a road accident, discovery shall be limited to disclosure by the plaintiff of any documents relating to special damages;

(b) subject to paragraph (2) where any party intends to place reliance at the trial on expert evidence, he shall, within 10 weeks, disclose the substance of that evidence to the other parties in the form of a written report, which shall be agreed if possible;

(c) unless such reports are agreed, the parties shall be at liberty to call as expert witnesses those witnesses the substance of whose evidence has been disclosed in accordance with the preceding subparagraph, except that the number of expert witnesses shall be limited in any case to two medical experts and one expert of any other kind;

(d) photographs, a sketch plan and the contents of any police accident report book shall be receivable in evidence at the trial, and shall be agreed if possible;

(e) (There is no subparagraph(e));

(f) The action shall be set down within six months;

(g) The Court shall be notified, on setting down, of the estimated length of the trial.

[43] If that is the case then O. 25 r. 8 of the RHC, which is still the law in our country, applies here. This means that there must be disclosure before trial of expert evidence but such disclosure is quite restrictive because by virtue of r. 8(5) (b) by O. 25 of the RHC the disclosure does not extend to experts' reports in medical negligence cases.

[44] It is interesting to note that for the sake of argument s. 22 of the Interpretation Acts 1948 and 1967 (Act 388) enacts that suspension of a subsidiary legislation like the RHC may only be effected by the authority which made the subsidiary legislation and in the context of this case the RHC may be suspended by the Rules Committee and not by the Honourable Chief Judge of Malaya. In its original text, s. 22 of the Interpretation Acts 1948 and 1967 (Act 388) enacts as follows:

> **22. Amendment, revocation, etc., of subsidiary legislation.**
>
> Subsidiary legislation may at any time be amended, varied, added to, revoked, suspended or revived by the person or authority by which it was made or, if that person or authority has been lawfully replaced by another person or authority, by that other person or authority.

[45] It is also interesting to refer to the case of *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645, a decision of the Federal Court. There the Federal Court had occasion to consider the crucial question of whether the practice direction could supercede or amend the court rules and Act of Parliament. Steve Shim CJ (Sabah & Sarawak), writing a separate judgment, had this to say:

> In *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor and Another Appeal* [1995] 3 MLJ 465, it was held that practice directions were effected for administrative purposes. I accept that as a correct statement of the law. Undoubtedly, they provide guidelines for a more effective implementation of the rules of court. They seek to clarify or highlight such rules. They may even, to some extent, modify them, but certainly they are not meant to supercede or deviate from court rules which have been statutorily laid down. To do so would, in my view, be a negation of the authority of Parliament which has conferred powers upon the Rules Committee under s. 17 of the CJA to make the rules of court.
>
> It is true that the Chief Justice has been empowered under r. 110 of the RFC to issue practice directions. So has the President of the Court of Appeal under r. 77 of the RCA. Nevertheless, it cannot have been in the contemplation of Parliament that they can issue practice directions in direct conflict with procedural rules of court which have been statutorily laid down. In my view, to the extent that such practice directions are in conflict, in the sense of superceding or deviating substantially from statutory rules of court, they are of no legal effect whatsoever. Of course, once practice directions have been properly and legally issued, they must be complied with. I believe that to be trite (see *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 MLJ 54; *Raja Guppal a/l Ramasamy v. Sagaran a/l Pakian* [1999] 2 MLJ 677).
>
> This brings into focus the question of whether the alternative requirement provided in Practice Direction No 1 of 1995 has the effect of superceding or substantially deviating from r. 18 of the RCA, in particular sub-r. (7) thereof which, as I have said,

> requires all relevant documents to be filed at the registry within six weeks after the entry of the appeal or within such further time as the court may allow. In respect of r. 18(4)(d) of the RCA, the Court of Appeal in *Capital Insurance Bhd v. Kasim* seems to have held that only the original or duplicate copies or certified true copies of those documents are acceptable. In principle, I think that is a fair proposition to take in order to avoid or prevent abuses. As mentioned earlier, the alternative requirement is one which allows an appellant to tender a copy of the judgment, decree or order appealed from on the day of hearing of the appeal in open court. The alternative requirement does not oblige the appellant to comply with the conditions set out in r. 18(7) of the RCA. In my view, it has the effect of superceding or deviating substantially from those conditions. This is in conflict with r. 18(7) of the RCA. As such, it cannot have any legal effect whatsoever. To that extent, it can and should be ignored. In the circumstances, I find no difficulty in holding that the appellant, on tendering a sealed copy of the Order appealed from on the hearing of the appeal in the Court of Appeal, has not complied with r. 18(4) and (7) of the RCA.

[46] And the late Mohtar Abdullah FCJ also writing a separate judgment said:

> It is clear that practice directions, with no statutory authority, cannot supercede the relevant court rules or the relevant Act of Parliament.

[47] I am certainly bound by the case of *Megat Najmuddin*. It is always prudent to refer to precedents. It is an indispensable foundation for an orderly development of the law in the country. I am bound to follow decisions in former cases decided by the superior courts (*Re Hallett's Estate Knatchbull v. Hallett* [1880] 13 Ch D 696 at 712, CA; and *Smith v. Harris* [1939] 3 All ER 960 at 965, CA). And I have been doing just that, all these years. According to Lord Halsbury in *Quinn v. Leathem* [1901] AC 495 at 506, HL, every judgment must be read as applicable to the particular facts proved because it is not intended to be an exposition of the whole law but rather it is governed and qualified by the particular facts of the particular case. That being the position of the law, I can safely say that the effect of O. 25 of the RHC cannot be suspended by Practice Direction No: 1 of 2001 and so the provision in O. 25 r. 8 of the RHC for disclosure before trial of expert evidence does not apply to medical negligence cases. I venture to say that O. 34 r. 4(2)(f) of the RHC provides for a disclosure of an expert's report in a situation

where the privilege has been waived. Rule 4(2)(f) of O. 34 of the RHC does not state that an expert's report is to be disclosed where the expert is intended to be called at the trial. Any party may identify a suitable expert and call him as a witness even after the commencement of the trial. Order 34 r. 4(2)(f) of the RHC does not provide for the consequential order that the court can make against the defaulting party for non-compliance like for instance committal for contempt of court or even striking out the pleading. At the most, in the worse possible scenario, by virtue of r. 7 of O. 34 of the RHC for non-compliance with the judge's direction, the judge may make an order "as meets the ends of justice". The RHC, being a generally worded piece of subsidiary legislation, cannot be used at the pre-trial case management level to bar a trial judge from taking relevant and admissible evidence from an expert as provided for under the Evidence Act 1950 (see ss. 45 and 46 of the Evidence Act 1950).

[48] It is interesting to note that in the English case of *Rahman v. Kirklees Area Health Authority* [1980] 3 All ER 610, a decision of the Court of Appeal, civil division, with a coram of Ormrod and Cumming-Bruce LJJ, the court there, under the then more permissively – worded English legislation, refused to order that the parties "be at liberty to call expert witnesses limited to those witnesses whose reports have been disclosed." Even today, in England, such wide orders would not be made where extensive amending legislations, both Parliamentary and subsidiary, have been introduced on the subject of pre-trial discovery of experts' reports. The sum total of it all would be this. That the parties can call their respective experts as witnesses even if privilege is claimed over their experts' reports. Simply put, what may be ordered in England now is the pre-trial disclosure of experts' reports where the makers of the reports are intended to be called at the trial to give evidence. In England too, Parliamentary legislation now provides that such an intention would wipe out the privilege. In any event, in England today, even if a party does not disclose his expert's report before trial, the trial judge may nevertheless grant leave for such expert to give oral evidence at the trial (see the Civil Evidence Act 1968, the Civil Evidence Act 1972 and the Courts and Legal Services Act 1990 as alluded to earlier).

[49] I perceive the law to be this. That legal professional privilege arises where the dominant purpose of the consultation is to obtain expert medical opinion. Put in a different way, once litigation is pending, any communication between client and solicitor or third

party will be privileged if the dominant purpose of the consultation was to obtain legal advice or to collect the salient expert evidence for use in litigation.

[50] It is germane to mention that an expert's opinion evidence would carry more weight when given after the expert has heard the evidence at the trial or has read the notes of evidence or the transcript of the trial. But, according to *Sarkar's Law Of Evidence*, vol. 1 at p. 883, "the better course to follow is that the expert should hear the evidence as to which he is asked his opinion (*Gopessure v. Bisessure*, 16 CWN 265, 285)." *Sarkar's Law Of Evidence*, vol. 1 at p. 881 after citing *R v. M'Naghten* [1844] 10 C1 & F 200, 212, 8 ER 718 noted as follows:

> So a physician, who has not seen the particular patient, may after hearing the evidence of others at the trial, be called to testify as to the general effects of the symptoms described by them and their probable consequences in the particular case.

[51] In other words, an expert's evidence becomes more relevant and weightier after he has heard the evidence at the trial. That being the case, an expert opinion may be commissioned by a party even during the course of the trial. The observations of Gopal Sri Ram JCA in *Dr Soo Fook Mun v. Foo Fio Na & Anor and Another Appeal* [2001] 2 CLJ 457 must be referred to. There his Lordship said:

> The third point has to do with the treatment meted out to the expert called by Dr Soo. I do not propose to delve into details. I will merely say that neither the treatment meted out to the defence expert witness during the course of the proceedings, nor the adverse comment made by the learned judge in his judgment was warranted. The main source of complaint against the defence expert is that his evidence was based on a reading of the plaintiff's evidence and that of her expert given during the trial. Quite frankly, I am unable to see anything wrong with this whatsoever. From my own experience at the Bar, it is a common occurrence for experts on one side to be present in court during the evidence of the other side. This is to enable the expert not only to advice counsel during cross-examination but also to be able to comment on the expert evidence of other side when he in turn gives evidence. It avoids surprise and delay. If, for any reason, an expert is unable to be present when the other side is giving evidence, it is perfectly proper for him or her to later study the notes of the evidence to ascertain the nature of the evidence

given. Dr Soo's expert did just this. Yet, he and counsel for Dr Soo received biting criticism from counsel for the plaintiff and the trial judge, both of whom I presume were unfamiliar with the normal practice and procedure that is followed in cases where experts give their evidence.

[52] In the present case at hand, the expert evidence is certainly relevant. What the expert tells the party consulting him is privileged. When the expert gives opinion evidence at the trial, the expert cannot be questioned in regard to communications which are privileged from disclosure unless the privilege is waived by the party concerned.

[53] An expert's report cannot be considered as an "oral" evidence. An expert's report is a privileged document which must be distinguished from the oral evidence given by the expert at the trial. If a party waives privilege at any stage, including at the trial proper, then the expert report may be tendered through the expert himself at the trial proper.

[54] Flowing from all these, I can safely say that the position in Malaysia would be this. That an expert may give oral evidence at the trial without his privileged expert report being tendered at the trial or being disclosed in advance. And that if a party waives privilege, then the expert report may be disclosed at the trial or even before the trial.

[55] Here, in the context of the present case, privilege has not been waived by the parties.

[56] It is an extremely serious matter, indeed it would be a grave miscarriage of justice to shut out a litigant from calling relevant witnesses at the trial when the Evidence Act 1950 does not make an expert witness to be a non-competent witness merely because his privileged report has not been disclosed by the litigant to the adverse party and to the court before the trial.

[57] I now come to s. 399 of the Criminal Procedure Code (F.M.S. Cap. 6) ("CPC") which talks of reports of certain persons, including Government Medical Officers. Section 399 of the CPC is housed in Chapter XXX1X of the CPC styled as "Special Provisions Relating To Evidence" and it applies to criminal trials only as stated in s. 3 of the CPC. The CPC has the status of an Act of Parliament and it has withstood the test of time. Section 399 of the CPC enacts as follows:

399 Reports of certain persons

(i) Any document purporting to be a report under the hand of any of the person mentioned in subsection (ii) of this section upon any person, matter or thing examined or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any inquiry, trial or other proceeding under this Code unless such person or Registrar shall be required to attend as a witness:

(a) by the Court; or

(b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:

Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial.

(ii) The following are persons to whom the provisions of this section apply:

(a) officers of the Institute for Medical Research;

(b) Government Medical Officers;*

(c) chemists in the employment of any Government in the Federation or the Government of Singapore;

*See LN 198/52

(d) any person appointed by the Minister by notification in the Gazette, to be a Document Examiner;

(e) Inspector of Weights and Measures appointed as such under any written law relating to weights and measures in force in the Federation; and

(f) any person or class of persons to whom the Minister by notification in the Gazette declares that the provisions of this section shall apply.

(iii) The persons referred to in subsection (ii) of this section and the Registrar of Criminals are by this Code bound to state the truth in reports made under their hands.

[58] Basically, in a criminal case, if the prosecution intends to introduce in evidence the reports of persons mentioned in s. 399 (ii) of the CPC, it must serve such report on the accused not less than ten (10) clear days before the commencement of the trial. If the prosecution fails to serve the report on the accused within the time provided then the report would not be admitted in evidence. In such a situation, the prosecution may call the maker of the report to give oral evidence instead of producing his report. In *Liew Chin Yoong v. Public Prosecutor* [1971] 1 MLJ 127, 128, Chang Min Tat J (as he then was) stated the same thing in his own words in this way:

> However, as far as I could find, the report prepared by the senior chemist was never proved to have been served on the accused in accordance with section 399 Criminal Procedure Code, so as to render it admissible: see, inter alia, *Chong Peng v. Public Prosecutor* [1954] MLJ 39 and *Public Prosecutor v. Ng Fah* [1954] MLJ 150. This failure on the part of the prosecution was perhaps the reason why he was called as a witness. But as a witness, he did not render his report admissible merely by producing a copy of it at the trial. If his report was in the first place inadmissible because of failure to serve it within the stipulated term, it could not be made admissible by the presence of the permitted author of it. Basically, a trial is to be decided on oral evidence, except where by statutory provisions, evidence could be adduced by reports or certificates in writing. Where the chemist is called by the prosecution to furnish the court with the evidence it has failed to adduce by his certificate, he must give oral evidence of his examination and findings, using his certificate, if he should find it necessary, to refresh his memory. This will have the practical effect of adducing in oral evidence what could not be admitted under section 399 of the Criminal Procedure Code.

[59] Thus, the prosecution has the option whether to produce the report in the course of the criminal trial or choose not to produce the report and instead call the maker of the report in order to give oral evidence thereof. If the report needs to be produced by the maker when the maker is giving his oral evidence then the report must be served on the accused within the stipulated time period (*Muhammed bin Hassan v. Public Prosecutor* [1998] 2 MLJ 273, FC).

[60] It must be borne in mind that there is no equivalent statutory provision like s. 399 of the CPC that may be applied in civil cases. Order 34 of the RHC is on pre-trial case management and it is a subsidiary legislation only. In civil cases, legal professional privilege attaching to experts' reports would be caught under s. 126 of the Evidence Act 1950.

[61] I was told that in the present case, the medical experts' reports were obtained from independent private medical practitioners and not from the Government Medical Officers as envisaged in s. 399(ii)(b) of the CPC. That being the case, s. 399 of the CPC has no relevance to the present case at hand, at all. At any rate, as I said earlier, the CPC applies to criminal trials only.

[62] It cannot be denied that discovery at pre-trial case management stage of medical experts' reports or opinions which the respective parties intend to rely upon at the trial proper has its merits and advantages. Suffice, for this exercise, that I list them down as follows:

(a) that the element of surprise will be eliminated altogether;

(b) that the delay in the proceedings will be minimised;

(c) that it will allow the parties to weigh the strength of their respective cases and assist them in resolving the dispute; and

(d) that the issues in dispute between the respective medical experts would be narrowed down and be positively identified.

[63] The crucial issue for determination would be whether the court has the power to direct discovery of medical experts' reports obtained by the parties? Speaking generally, the discovery of documents after the commencement of proceedings is governed by the relevant provisions of the RHC. Foremost would be O. 24 of the RHC which deals with discovery and inspection of documents on an application or notice by one of the parties to the proceedings. Order 24 r. 12 of the RHC provides that at any stage of the proceedings in any cause or matter the court may, subject to r. 13(1), order any party to produce to the court any document in his possession, custody or power relating to any matter in question in the cause or matter and the court may deal with the document when produced in such manner as it thinks fit.

A Order 24 r. 13(1) of the RHC states that no order for the production of any documents for inspection or to the court shall be made under any of the foregoing rules unless the court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs. Order 24 r. 13(2) of
B the RHC states that where on an application under this Order for production of any document for inspection or to the court privilege from such production is claimed or objection is made to such production on any other ground, the court may inspect the document for the purpose of deciding whether the claim or
C objection is valid.

[64] This would be followed by O. 34 r. 4(2)(f) of the RHC which has been alluded to earlier. Next, it would be O. 38 r. 4 of the RHC which provides that the court may, at or before the trial
D of any action, order that the number of medical or other expert witnesses who may be called at the trial shall be limited as specified by the court. Basically, O. 38 r. 4 of the RHC deals with the jurisdiction of the court in restricting the number of expert witnesses to be called and it does not provide for the
E making of an order or direction for pre-trial discovery of the expert's report.

[65] Ultimately, it is O. 34 of the RHC that governs the pre-trial case management of all actions began by writ. The plaintiff shall,
F not later than 14 days after the close of pleadings, cause to be issued from the registry of the court a notice in Form 63 requiring the parties to the action to attend before the judge. Then the judge, to whom the action has been assigned shall, after conferring with the parties, make such orders and give such
G directions as to the future conduct of the action in order to ensure its just, expeditious and economical disposal. The directions to be given by the judge shall include all such directions as set out in O. 34 r. 4(2)(a) to (p) of the RHC. The judge too is not precluded from giving such directions as are necessary at any stage
H of the proceedings. The judge too may of his own motion or on an application by letter by any party schedule and convene as many pre-trial conferences as he may deem necessary for the giving of directions or of such further directions as he may deem necessary or for the amendment or variation of any direction
I already given. And to ensure the just, expeditious and economical disposal of the case the judge is also empowered to direct the parties to the action to furnish the reports of the experts and fix the time for the delivery of such reports. These reports must

necessarily include the medical experts' reports. But the delivery of these medical experts' reports should not infringe nor affect the rules of substantive law as set out in the Evidence Act 1950 and the principle of legal professional privilege.

[66] Medical opinions are matters of science and medical experts can be called to explain words or terms of science or give assistance to the court as to the laws of science or the working of a technical process or system of practice. Section 45 of the Evidence Act 1950 covers those persons who are called experts and s. 126 of the same Act relates to professional communications which are privileged in nature. Cases on confidential communications can easily be found in the law journals and, for this exercise, I shall refer to some of them, namely:

(a) *Anderson v. Bank of British Columbia* [1876] 2 Ch. D 644 at 649;

(b) *Wheeler v. Le Marchant* [1881] 17 Ch. D. 675 at 681;

(c) *Guardian Royal Exchange Assurance of New Zealand Ltd. v. Stuart* [1985] 1 NZLR 596, CA of New Zealand;

(d) *Ventouris v. Mountain* [1991] 3 All ER 472 at 475 to 476; and

(e) *Broadcasting Corp. of New Zealand v. Wilson & Horton Ltd.* [1991] 1 NZLR 335.

[67] Briefly, these cases stated the law in this way. That confidential communications made, after litigation has commenced or contemplated, between:

(i) a lawyer and his client; or

(ii) a lawyer and his non-professional agent; or

(iii) a lawyer and a third party,

[68] for the sole or dominant purpose of such litigation are said to be privileged from production. Such privilege is enduring in its effect. Cooke J, in *R v. Craig* [1975] I NZLR 597, after referring to a number of authorities, had this to say at p. 598 of the report:

> In that situation of indecisive authority one must look to first principles. A convenient statement is that of Stirling J in *Goldstone*'s case:

> These decisions appear to be based on the necessity of allowing full and free communication for the purposes of litigation, not only between a solicitor and his client, but between the solicitor and persons whose assistance he requires, or with whom he communicates in order to enable him properly to conduct the litigation ([1899] 1 Ch 47, 52).

With regard to both classes of case the privilege is the client's. If the solicitor were called as a witness it would be his duty to claim privilege on behalf of his client unless instructed otherwise.

[69] Hodson LJ in *Schneider v. Leigh* [1955] 2 All ER 173, CA at p. 177 aptly said:

> It is essential to bear in mind that the privilege is the privilege of the litigant, accorded to him in order that he may be protected in preparing his case, and not the privilege of his witnesses as such. The litigant can waive the privilege if he chooses, and if he does so the proofs of his witnesses can be shown to the opposing party without the witnesses having any ground for complaint.

[70] Jeffrey Pinsler in his book entitled *"Evidence, Advocacy and the Litigation Process"* wrote at p. 285 of his book the following words:

> Communications relating to litigation
>
> The common law recognises a specific privilege which is intended to maintain the confidentiality of the advocate's approach to the litigation and preparation of the case. Litigation privilege achieves the same objective as legal professional privilege by not obliging the advocate to disclose all the information which he obtains from third parties for the purpose of the litigation. Therefore, a document made by a third party and submitted to a lawyer (such as a survey or medical report, or the report of an investigation into the circumstances of an accident) at the instance of the client will only be privileged if the dominant purpose of that document is for pending or contemplated litigation.

[71] All these authorities serve as useful guidelines. I can safely say that an expert report obtained by a litigant in a pending or contemplated suit is privileged. Unless the privilege is waived by the litigant, the court cannot make an order for discovery of the report. These principles of law extend also to medical experts' reports. In a medical negligence case, medical experts' reports are bound to be prepared by the medical experts themselves. These medical experts' reports would usually be commissioned by a party for the purpose of the litigation and for obtaining legal advice and

they would therefore be privileged from disclosure. A party cannot be compelled to disclose his medical expert's report. It is for the party who commissioned for the preparation of the report to decide whether to waive privilege. The decision to waive privilege may be made at any stage of the proceedings. It is a matter of right and it is recognised by everyone. A party waiving privilege as of right cannot be made the subject of an adverse order for costs. An adverse order for costs may be made against the party if that party had made late discovery of a discoverable document – a document which is not covered by privilege, resulting in a delay of the trial. It is common knowledge that an expert's report usually contains an advice to the party regarding the merits and weaknesses of the party's case. It is prudent that all the parties to the action should take the relevant expert advice – be it medical expert advice or otherwise, and be ready for the trial of the action. In the event that the privilege is waived and the expert's report is adduced in evidence, there is no justification in law for the opposing party to seek an adverse order as to costs. It must be borne in mind that each party is expected to be ready for trial on the issues raised in the pleadings and the fact that an expert's report is introduced in evidence during the trial does not in any way alter the issues that are raised by the parties in the pleadings. It is part and parcel of my judgment, for the reasons as adumbrated above, that r. 4 (2)(f) of O. 34 of the RHC and r. 4(2)(j) of O. 34 of the RHC are in conflict with the relevant provisions of the Evidence Act 1950 as alluded to in this judgment and the common law principle regarding privilege. As I said, the RHC is only a subsidiary legislation and the relevant rules in the RHC as alluded to in this judgment are therefore *ultra vires* the relevant provisions of the Evidence Act 1950 as alluded to in this judgment and the common law which are the substantive laws.

[72] Allow me to recapitulate the following salient points:

(1) The rule that the court may limit the number of expert witnesses cannot apply to medical negligence cases *(Rahman v. Kirkless Area Health Authority (supra))*.

(2) According to *Re Grosvenor Hotel, London (No. 2) (supra)* that the Rules Committee's power to regulate the procedure and practice of the court does not allow it to alter the rules of evidence. That the Crown privilege is a principle of

A constitutional law to be religiously followed in the administration of justice and in the process of administering justice.

(3) That legal professional privilege and litigation privilege are two
B fundamental matters pertaining to evidence and not in regard to procedure and practice *(R v. Secretary of State for the Home Department, ex parte Leech (supra))*.

(4) That for privilege to be overridden, there must be
C Parliamentary legislation allowing it *(Oxfordshire County Council v. M and another (supra))*.

(5) What Brooke LJ said in *Carlson v. Townsend (supra)* as reproduced earlier in this judgment sums up the current common law position in Malaysia and this is supported by the
D provisions in the Evidence Act 1950 regarding privilege.

(6) The dominant purpose of the document must be ascertained. If it is for pending or contemplated litigation then it will be classified as privileged. In *Waugh v. British Railways Board*
E [1980] AC 521, an investigation report concerning an accident was the subject of debate as to its admissibility and the court held that it was not privileged because it was not made for the dominant purpose of litigation. The Court of Appeal in *Ventouris v. Mountain (The Italia Express)* [1991] 1 WLR 607,
F at 621 to 622 held that privilege was based on the purpose for which the document was brought into existence rather than the purpose for which it was obtained. The Court of Appeal also held that the privilege may operate in relation to pre-existing documents where these have been selected by a
G solicitor for the purpose of advising his client and obtaining evidence thereto and that the solicitor in question has exercised reasonable skill and judgment in the selection (*Lyell v. Kennedy (No. 3)* [1884] 27 Ch D 1; and *Dubai Bank v. Galadari (No. 7)* [1992] 1 All ER 658).

H **[73]** Another contentious point to consider is this. There is no guidance given by the law in regard to the form and content of the experts' reports. That being the case, the parties may disclose an expert's report which purports to comply with an order for
I discovery but says very little of substance in it. For instance, a general surgeon may give an expert report saying that he saw the plaintiff on a certain day and time, examined the plaintiff and treated the plaintiff accordingly without going into the issues raised

by the pleadings and thereby leaving such matters or issues to be raised at the trial proper. What good would be the general surgeon's so called expert medical report if it is too scanty?

[74] Unequal, non-mutual and irrelevant discovery of experts' reports would spell disaster. The learned counsel for the plaintiff posed this question: if we call a general surgeon, a colo-rectal surgeon, an anaesthetist and an occupational health physician, would the defendants' reciprocate and do the same thing by ensuring that all the relevant clinical facts and issues are covered by their experts? I wonder whether I will ever see an equal, mutual and a relevant discovery of the experts' reports in this case? It is certainly difficult to follow the English practice of mutual, equal and simultaneous discovery of experts' reports because we do not have a proper enabling legislation. We too do not have the right of pre-action discovery nor do we have the right of discovery against non-parties. We also do not have an adequate factual information in this case. Everything seems to be lacking in all areas. Again, we do not have an Expert Witnesses' Institute nor do we have an adequate number of sound experts. We also suffer from an inadequate medico-legal expertise and we too do not have an adequate medico-legal system.

[75] The Civil Evidence Act 1968 and the Civil Evidence Act 1972 provide Parliamentary authority to the English Rule Committee to make rules regarding discovery of experts' reports before trial where it is intended that the experts give evidence at the trial. There is no similar Parliamentary authority in Malaysia. At this juncture, perhaps the decision of the English Court of Appeal with a coram of Denning MR, Lawton and Donaldson LJJ in *Whitehouse v. Jordan and Another* [1980] 1 All ER 650, should be referred to. That was an interesting case. There the defendant, a senior hospital registrar, was in charge of the delivery of the plaintiff as a baby following a high risk pregnancy. After the mother had been in labour for 22 hours the defendant decided to carry out a test to see whether forceps could be used to assist the delivery. In doing so the defendant followed a suggestion by his head of department, a consultant professor of obstetrics, in his case notes on the mother. The defendant pulled on the baby with forceps five or six times and then fearing for the safety of the mother and child he carried out a Caesarean section quickly and competently. The plaintiff was born with severe brain damage and,

A acting by his father, brought an action in negligence against the defendant alleging want of professional skill and care by pulling too hard and too long on the forceps and so causing the brain damage. At the trial there was evidence by a junior registrar who was present at the delivery that the defendant's use of the forceps
B was not violent or untoward. There was also eminent medical opinion that it was a matter of clinical judgment based on experience as to how hard and how many times a doctor should pull on obstetric forceps. The mother gave evidence and although her description of what had happened was not physically possible,
C the judge interpreted it as meaning that the forceps were applied with such force that she was pulled to the bottom of the delivery bed. There was also in evidence a report prepared by the consultant professor shortly after the birth and after discussion with the defendant, in which the professor stated that the
D defendant had "disimpacted" the baby's head prior to the Caesarean section. Although the professor gave evidence that he had used the term "disimpacted" to denote that only slight force was needed to free the head before delivery, the trial judge interpreted the term in its medical sense, namely that the baby's
E head had become wedged or stuck in the birth canal because of the use of the forceps and force was required to move it. Because of his interpretation of the professor's report and the mother's evidence the trial judge (Bush J) found that the defendant had pulled too hard and too long on the forceps causing the foetus to
F become wedged in the birth canal, that in unwedging the foetus he had caused asphyxia which in turn had caused cerebral palsy and that in so using the forceps he fell below the high standard of professional competence required by law and was therefore negligence. The defendant appealed. The grounds of the appeal
G were: (1) that the trial judge misdirected himself in holding that there was any sufficient evidence that the first defendant pulled too hard and too long when using forceps, (2) that the trial judge failed to consider and find whether, if the first defendant made any error, it was an error of clinical judgment as opposed to
H negligence, and (3) that the judgment was against the weight of the evidence. The English Court of Appeal allowed the appeal for the following reasons:

(a) An error of clinical judgment by a medical practitioner did not
I of itself amount to negligence in the legal sense. Accordingly (Donaldson LJ dissenting), even if the finding that the defendant had pulled too hard and too long with the forceps

was accepted, that did not constitute a finding of negligence, for the defendant's decision to continue pulling on the forceps was merely an error of clinical judgment or (per Lord Denning MR) was not, on the evidence, improper at all (dictum of Denning LJ in *Roe v. Ministry of Health* [1954] 2 All ER 131, at 139 applied).

(b) In any event, (Donaldson LJ dissenting), the court was entitled to, and would, reverse the trial judge's finding that the defendant had pulled too hard and too long with the forceps because that finding was based on an unjustified interpretation of the professor's report and the mother's evidence, especially as the latter contradicted the evidence of the doctors who were present at the delivery and the rest of the mother's evidence had been rejected by the judge (per Lawton LJ) because, in this particular instance, the appellate court was entitled to disregard the trial judge's assessment of the reliability of a witness (*The Hontestroom* [1927] AC 37 was applied).

(c) As long as liability in this type of case rests on proof of fault, judges will have to go on making decisions they would prefer not to make. The victims of medical mishaps of this kind should be cared for by the community and not by the hazards of litigation.

[76] The joint medical reports of two eminent Professors in *Whitehouse v. Jordan and Another (supra)* were criticised and this was how Lord Denning MR handled it (see p. 655 of the report):

> In addition I may say that Professor Sir John Stallworthy (Oxford, now retired) at first made a report saying that Mr Jordan was not negligent. He said that he had dealt with the case 'with courage and skill'. But afterwards Sir John Stallworthy joined with Sir John Peel (also Oxford, retired) in holding that Mr Jordan was negligent. Their joint report was the justification for the continuance of this action to trial. But their joint report has been subjected to severe criticism and has been shown to be mistaken on some very important points.
>
> In the first place, their joint report suffers to my mind from the way it was prepared. It was the result of long conferences between the two professors and counsel in London and it was actually 'settled' by counsel. In short, it wears the colour of special pleading rather than an impartial report. Whenever counsel

'settle' a document, we know how it goes. 'We had better put this in', 'We had better leave this out', and so forth. A striking instance is the way in which Professor Tizard's report was 'doctored'. The lawyers blacked out a couple of lines in which he agreed with Professor Strang that there was no negligence.

There is also evidence of serious mistakes in the joint report itself. The two professors said that the baby's head was 'not engaged', whereas the hospital notes made it clear that those on the spot had found it was 'engaged'. And the judge so found.

The two professors also said that the pulling was so hard that Mrs Whitehouse was 'lifted from the bed' which they explained as meaning that she was pulled down off the bed and lifted back on to it again. That was contrary to all the evidence in the case, including that of Mrs Whitehouse herself. The two professors did not have the benefit of the evidence of Dr Skinner. He said that nothing of the kind took place.

The two professors also criticised the hospital for not having made a pelvic assessment: without paying sufficient regard to the fact that Mrs Whitehouse was so tense that it could not be done: and she refused an X-ray.

The defects in the joint report of the two professors are so great that, to my mind, it cannot stand up against the reports of the other distinguished men in this case.

[77] This meant that the making of an order for pre-trial discovery of medical experts' reports will also be subject to criticism, adverse or otherwise. It would be better to have the medical experts to attend court and to give their evidence *viva voce* while taking the oath in the witness box instead of having their evidence pre-packaged before the trial in the form of medical reports prepared in a questionable manner by the medical experts, the parties and their counsel.

[78] I must reiterate that medical experts' reports are privileged from disclosure. The learned counsel for the plaintiff pointed out that they have no objections if non-expert, non-privileged medical reports are disclosed before trial. It is said that a medical report, especially in a medical negligence case, does not become an expert's report merely because it is written by a doctor. I was informed from the bar that counsel for the first defendant as well as for the second defendant agree with the stand of the counsel for the plaintiff that experts' reports remain privileged from disclosure.

[79] In regard to this case, I was told that the plaintiff had seen a number of doctors who are not parties to this action and who are working at clinics and hospitals which are not owned and operated by any of the defendants. According to the plaintiff's learned counsel, the medical records kept by some other doctors and hospitals regarding the plaintiff's case would be relevant to this action but unfortunately, the plaintiff and the defendants do not have the right of discovery against those other doctors and those other hospitals. In these circumstances, it would be obvious that the parties will have to wait patiently until the trial begins. No discovery would be possible before trial and the subpoena must issue for the attendance of those other doctors from those other hospitals.

[80] At the trial, the weight that should be attached to the opinion evidence of an expert is a matter entirely for the judge to decide. According to Lord President Cooper in *Davie v. Edinburgh Magistrates* [1953] SC 34 at 40, that the duty of experts "is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence". The judge as the tribunal of fact must decide the case according to the evidence. Witnesses cannot usurp the function of the judge. It must be borne in mind that witnesses, experts and non-experts alike, are called to testify and not to decide the case. It is the judge who will have to decide the case. Thus, in *Stevens v. Simons* [1988] CLY 1161, CA, the fact that an agreed medical report contained an opinion that symptoms suffered by the plaintiff were not attributable to injuries sustained in an accident, did not prevent the judge, who after having read the reports and heard the evidence, from concluding that such symptoms were so attributable.

[81] In Britian, in Access to Justice, Final Report HMSO [1996], Lord Woolf considered and regarded expert evidence as one of the major generators of unnecessary cost in civil litigations operating, as it were, against the principles of proportionality and access to justice. Lord Woolf expressed his concerns about the lack of impartiality of experts. Taylor Treatise on the *Law of Evidence* (12th edn) at p. 59 treated experts with disdain when the learned authors said, "it is often quite surprising to see with what facility and to what extent, their views can be made to correspond

with the wishes or the interests of the parties who call them." John Basten in his article entitled *"The Court Expert in Civil Trials, a Comparative Appraisal"* [1977] 40 MLR 174 commented as follows, "The court hears not the most expert opinions, but those favourable to the respective parties." It is interesting to note that Lord Woolf's Final Report advanced a number of recommendations which has since formed the basis of the new rules and it is to be found in Part 35 of the Civil Procedure Rules 1998 and the accompanying Practice Directions. The Civil Procedure Rules 1998 (hereinafter referred to as "CPR 1998") imposed on experts generally an overriding duty to the court, it also created a duty to restrict the amount of expert evidence to be adduced as well as introducing new requirements in regard to the form in which expert evidence shall be given. It also made reference to the principle of advance disclosure. In Malaysia, we do not have similar rules like that of the CPR 1998 along the lines of Lord Woolf's recommendations. I must be forgiven for reproducing some parts of the CPR 1998 as they are of significance. Rule 35.1 of the CPR 1998 states as follows:

> 35.1 Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.

[82] Then there is r. 35.3 of the CPR 1998 which states as follows:

> 35.3 (1) It is the duty of an expert to help the court on the matters within his expertise.
>
> (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

[83] Thus, it can be seen that the expert in helping the court should act in as impartial and objective a manner as he can. The court's powers are further enhanced by r. 35.4 of the CPR 1998. That rule states as follows:

> 35.4 (1) No party may call an expert or put in evidence an expert's report without the court's permission.
>
> (2) When a party applies for permission under this rule he must identify:
>
> (a) the field in which he wishes to rely on expert evidence; and

(b) where practicable the expert in the field on whose evidence he wishes to rely.

(3) If permission is granted under this rule it shall be in relation only to the expert named or the field identified under paragraph (2).

(4) The court may limit the amount of the expert's fees and expenses that a party who wishes to rely on the expert may recover from any other party.

[84] Briefly put, it allows the court to give directions about expert evidence and the court too has to decide whether to permit a party to adduce expert evidence as well as to place the ceiling on the expert's fees and expenses. We do not have the equivalent of this in Malaysia.

[85] Rule 35.5 of the CPR 1998 provides as follows:

35.5 (1) Expert evidence is to be given in a written report unless the court directs otherwise.

(2) If a claim is on the fast track, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice.

[86] It means this. That in the case of claims on the fast track there is a presumption that if expert evidence is permitted, it should be given by means of an expert's written report rather than by calling the expert as a witness. Here, in Malaysia, there is no equivalent provision. Here too, in the Kuala Lumpur civil division, we saw the demise of the fast track system about two years ago.

[87] On the need to prepare a single point expert report, reference should be made to the CPR 1998. There, r. 35.7 provides as follows:

35.7 (1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only.

(2) The parties wishing to submit the expert evidence are called 'the instructing parties'.

A (3) Where the instructing parties cannot agree who should be the expert, the court may:

(a) select the expert from a list prepared or identified by the instructing parties; or

B (b) direct that the expert be selected in such other manner as the court may direct.

[88] It would certainly save expense and put the parties on an equal footing if there is a single expert report. It is most likely that the court will expect the parties to agree as to who the expert C should be. In regard to the instructions to be given to a single joint expert, r. 35.8 of the CPR 1998 states as follows:

35.8 (1) Where the court gives a direction under rule 35.7 for a single joint expert to be used, each instructing party may D give instructions to the expert.

(2) When an instructing party gives instructions to the expert he must, at the same time, send a copy of the instructions to the other instructing parties.

E (3) The court may give directions about:

(a) the payment of the expert's fees and expenses; and

(b) any inspection, examination or experiments which the expert wishes to carry out.

F

(4) The court may, before an expert is instructed:

(a) limit the amount that can be paid by way of fees and expenses to the expert; and

G (b) direct that the instructing parties pay that amount into court.

(5) Unless the court otherwise directs, the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses.

H

[89] In a situation where one party has access to information about the basic facts on which expert opinion will be based upon, it would certainly be difficult for the other party to properly instruct an expert without access to that information. In such a I situation, r. 35.9 of the CPR 1998 empowers the court to direct that one party to provide such information to the other. That rule states as follows:

35.9 Where a party has access to the information which is not reasonably available to the other party, the court may direct the party who has access to the information to:

(a) prepare and file a document recording the information; and

(b) serve a copy of that document on the other party.

[90] As to the contents of the expert's report, r. 35.10 (3) and (4) of the CPR 1998 provide as follows:

35.10 (3) The experts report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

(4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions:

(a) order disclosure of any specific document; or

(b) permit any questioning in court, other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.

[91] According to para. 1.0.2 of the White Book, the principal purpose of the CPR 1998 is to effect a substantial change in the handling of civil cases in the courts whilst at the same time reinforcing "procedural values" which, although acknowledged in the past, were not always put into effect. It must be emphasised that the CPR 1998 brought into force many new procedural rules and also re-enacted much that was found in the Rules of the Supreme Court and the County Court Rules. The CPR 1998 was made by a Rule Committee established by s. 2 of the Civil Procedure Act 1997. In part, the power to make rules of court is governed by Schedule 3 of the Civil Procedure Act 1997. Now, para. 6 of Schedule 3 to the Civil Procedure Act 1997 states that the CPR 1998 "may, instead of providing for any matter, refer to provisions made or to be made about the matter by directions." It is pertinent to note that most parts of the CPR 1998 are supplemented by the Practice Directions and the extent to which rules in the CPR 1998 would be governed by the Practice Directions would vary and it is not fixed. Generally speaking, the Practice Directions would supplement the CPR 1998 and all these can be seen at para. 1.0.3 of the White Book.

[92] Rule 1 of the CPR 1998 sets out the overriding objective and it states as follows:

> 1.1 (1) These Rules are a new procedure code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable:
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate:
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.
>
> 1.2 The court must seek to give effect to the overriding objective when it:
>
> (a) exercises any power given to it by the Rules; or
>
> (b) interprets any rule.
>
> 1.3 The parties are required to help the court to further the overriding objective.

[93] The duty of the court to manage cases is set out in r. 1.4 of the CPR 1998. It states as follows:

> 1.4 (1) The court must further the overriding objective by actively managing cases.
>
> (2) Active case management includes:
>
> (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;

(b) identifying the issues at an early stage; A

(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

(d) deciding the order in which issues are to be resolved; B

(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;

(f) helping the parties to settle the whole or part of the C case;

(g) fixing time tables or otherwise controlling the progress of the case;

(h) considering whether the likely benefits of taking a D particular step justify the cost of taking it;

(i) dealing with as many aspects of the case as it can on the same occasion;

(j) dealing with the case without the parties needing to E attend at court;

(k) making use of technology; and

(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently. F

[94] As demonstrated, Britian is ahead of us. What a shame! Perhaps our Rules Committee can do something about it.

[95] After I have completed preparing the draft of this judgment, I received a book from a good samaritan in Johor Bahru. The G book is entitled *"Law Of Privilege"* by Suzanne B. McNicol. It is an Australian book. I anxiously read the book and I found it to be very enlightening. At p. 1 of the book, the learned author succinctly wrote:

H

> However, in certain circumstances a witness can claim privilege; and this means that information which is otherwise relevant to the issues to be tried and which the witness would otherwise be under an obligation to disclose, may be withheld from the court or administrative tribunal. Privilege is also often claimed in I interlocutory proceedings at the stage of discovery; that is, at the early stage of production of documents in a party's possession or in answering interrogatories, before the actual trial of a civil action.

[96] The learned author of the book defined "waiver" in this way (see p. 21):

> Waiver is an 'act of conduct' (*Re Stanhill Consolidated Ltd* [1967] VR 749 at 752) which amounts to the foregoing of a right to keep certain information confidential. The immediate result of waiver is the release or disclosure of information which was formerly protected. The only person who can waive privilege is the 'holder' of the privilege.

[97] In regard to the doctor and patient privilege, the learned author of the book had this to say (see p. 339 to p. 340):

> **A. A common law rule**
>
> At common law it has long been accepted that there is no privilege in existence which would protect communications between doctor and patient. As Lord Edmund-Davies asserted in *D. v. National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 244-245, our law does not put the doctor-patient relationship in the same class as that of lawyer-client and the only kind of professional privilege which English law allows is that of legal adviser and client. In the early English *Duchess of Kingston's Case* [1776] 20 State Tr. 355, the House of Lords ruled that a doctor who had attended the accused and her alleged husband was obliged to reveal to the court whether he knew of any marriage between them, despite the doctor's objection that he had acquired the knowledge in a confidential trust in his profession consistent with his professional honour. Mansfield LCJ stated:
>
> > [A] surgeon has no privilege, where it is a material question, in a civil or criminal cause, to know whether parties were married, or whether a child was born, to say that his introduction to the parties was in the course of his profession and in that way he came to the knowledge of it. ... If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever.
>
> The principle established in the *Duchess of Kingston's Case* [1776] 20 State Tr. 355, has been supported for over two centuries in respect of all medical witnesses, including psychiatrists. In the divorce case of *Nuttall v. Nuttall and Twyman* [1964] 108 Sol. J 605, a husband subpoenaed as a witness, a psychiatrist who had been consulted by the wife and the co-respondent. When examined in chief by the husband's counsel as to what the wife and the co-respondent had said to him, the psychiatrist protested

against answering the questions on the ground of professional confidence. Judge Edgedale held that what a person said to a doctor in a professional consultation was not privileged, and the witness must either give the evidence or be committed to prison for contempt of court. The witness then gave the evidence. Similarly in *Hunter v. Mann* [1974] QB 767; [1974] 2 All ER 414, a doctor was convicted of contravening s. 168(3) of the Road Traffic Act 1972 (U.K.) because he refused to give information to a police officer which might have led to the identification of the driver of a stolen car. The doctor in this case had refused to give the information on the basis that it had been obtained solely through the relationship of doctor and patient and that to divulge it would be a breach of professional confidence. Boreham J stated clearly that a doctor has no right to refuse to disclose confidential information in the course of judicial or quasi-judicial proceedings where the doctor is compelled by law to so disclose. There is no privilege in judicial proceedings for a doctor to withhold confidential information obtained in the course of a professional relationship with a patient. However, in situations other than where the doctor is compelled by law to disclose, it is nonetheless clear that a doctor's duty not to disclose information is enforceable at the behest of the patient in an action of contract or for breach of duty.

There has been little judicial dissent from the common law position, although Buller J once said that it is 'much to be lamented that the law of privilege is not extended to medical persons' and Lord Edmund Davis stated that he had long thought that the law should be altered in favour of putting the doctor-patient relationship on the same footing as the lawyer-client relationship. Such judicial sentiments have however made little impact on the common law position, which has been consistently to direct doctors to answer questions about their patients' health apart from 'occasional and proper dispensations by courtesy.

[98] The rationale for the rule has been explained by the learned author of the book in this way (see p. 341 to p. 344):

B. Rationale for a rule: theoretical considerations

(i) Arguments for a privilege

Many of the arguments in favour of a doctor-patient privilege are similar to the arguments in favour of a clergy-communicant privilege. First, there is the civil libertarian argument which relies on a citizen's fundamental right to seek medical treatment and to consult doctors without interference from the law. This argument proceeds on the basis that people should be discouraged to seek

medical treatment, that candour and trust are essential to the doctor-patient relationship, and that some people might be deterred from consulting a doctor if they know their confidences might be revealed at some later date to a court. Also inherent in this argument is the assumption that the public interest will be promoted by the effective treatment of patients, and that high standards of community and public health will be maintained if medical professional privilege exists. The corollary of this argument, namely, that the quality of medical treatment may be hampered in the absence of a privilege will be considered below. Secondly, there is a strong ethical duty imposed on doctors not to divulge information obtained and communications made in professional confidence. This is said to create a serious ethical dilemma for doctors who are faced with the choice of disobeying their own ethical standards of confidence or disobeying the demands of the court for evidence. Thirdly, it is claimed that doctors, when faced with such a choice, will invariably disobey a law compelling confidential communications and choose to undergo the legal sanction attached, such as a conviction for contempt of court. A privilege is therefore required to avoid such undesirable consequences for members of the medical profession.

As to the first argument, it is said that the patient needs to be protected from the fear of disclosure. As Scholl J stated in *Pacyna v. Grima* [1963] VR 421, the 'fear seems to have been that persons suffering from illness or disease might be restrained by fear of the ultimate disclosure of their confidences from seeking medical attention in due time, or at all'. In the present author's opinion, it is clear that there is a dominant public interest in patients being able to make a full and frank disclosure to their doctors without fear that the doctors would disclose the information to others. On the other hand, there is little evidence to support the view that persons in serious need of medical assistance would refrain from seeking assistance out of fear that their confidences would be revealed in future litigation. However, this argument appears to go further than simply asserting that the privilege is necessary to induce persons to see a doctor. Rather, the encouragement to patients to seek medical assistance is but the first step in reaching the goal of promoting public health and effective medical treatment of good quality. In the English case of *X. v. Y.* [1988] 2 All ER 648, a case concerning doctors who were believed to be continuing to practise despite having contracted A.I.D.S., Rose J said:

> In the long run, preservation of confidentiality is the only way of securing public health; otherwise doctors will be discredited as a source of education, for future individual patients will not come forward if doctors are going to

> squeal on them. Consequently, confidentiality is vital to secure public as well as private health, for unless those infected come forward they cannot be counselled and self-treatment does not provide the best.

Hence, it is inherent in the first argument in favour of the privilege that the absence of privilege somehow poses a threat to public health, because it can deter people from seeking medical assistance and can affect the quality of treatment.

As to the second argument, it is clear that there are strong ethical obligations imposed on doctors not to divulge professional confidences. Medical confidentiality is ages old, going back to pre-Christian times, and in the 5th century B.C. was stated in the Hippocratic Oath in the following terms:

> Whatsoever in connection with my professional practice or not, I see or hear in the life of men which ought not to be spoken of abroad I will not divulge as reckoning that all such should be kept secret.

Such strong ethical principles of confidentiality are restated in more modern language by the World Medical Association, in the International Code of Medical Ethics, in the Code of Ethics of the Australian Medical Association (A.M.A.), and by the Standing Committee of Doctors of the European Economic Community (E.E.C.) It is generally agreed by all professional medical bodies that confidentiality of information obtained from a consultation should be absolute except in five circumstances: first, when the patient gives consent; secondly, when it is undesirable to seek consent on medical grounds; thirdly, the doctor's overriding duty to society; fourthly, for certain medical research; and fifthly, when it is required by due legal process. The ethical duty of secrecy is also qualified by legislation under which the doctor has a duty to file information with statutory authorities relating, for example, to cases of tuberculosis and other contagious and infectious illnesses, sexually transmitted diseases, and generally to births and deaths. Nevertheless, the strict code of ethics generally applies and doctors who breach it may be censured or even deregistered by their professional association. A private civil action may also be brought in contract, tort and equity for breach of the doctor's duty of confidentiality, and this will be dealt with briefly below. These professional standards of secrecy create a serious ethical dilemma for doctors who are subpoenaed to give evidence as to information acquired whilst attending the patient. Forcing doctors by process of law to reveal what their patients have told them may seem not only distasteful by making such 'unduly harsh demands' on the doctors, but it may bring the whole court system into disrepute.

A The third argument in favour of medical professional privilege flows naturally from the second. Basically, it is argued by some that when a doctor's legal duty as a witness comes into conflict with her or his professional code of secrecy, a doctor should disobey the law in favour of adhering to the ethical obligation. Indeed, one of the main arguments for establishing a doctor-
B patient privilege by statute in New York in 1828 proceeded on the basis that doctors will choose to follow their ethical duty to their patients over their legal duty to the court:

> During the struggle between legal duty on the one hand,
C and professional honour on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversion or concealment of truth too strong for human resistance.

There is also some slight evidence that doctors will refuse out of
D ethical duty to divulge patient confidences even in the face of a court order.

Nevertheless, it is submitted that it is difficult to speculate on which course of action doctors will take, and in the present author's opinion it may well be the case today that doctors are
E more aware of their legal rights and obligations and may choose pragmatically to disclose what is necessary for the advancement of justice, rather than flout the law and undergo needless criminal sanctions. It is submitted that if one were to speculate, it may be that the minister or priest is more likely to resist disclosure and
F 'assert the primacy of the spiritual against the temporal' than is the doctor who is faced with a similar dilemma. Whether or not this is the case, it should nonetheless be highlighted that the tension between naturalism and positivism is also present in the context of the present debate, and the presence of this tension provides some argument for saying that there should be legislation
G to protect the doctor-patient relationship so as to reduce unnecessary friction between medical ethics and the law.

[99] The learned author of the book proceeded to set out the arguments against the creation of the doctor-patient privilege and
H this can be seen at p. 344 to p. 350:

(ii) Arguments against the privilege

There are four main arguments against the creation of a doctor-patient privilege and, in the present author's opinion, the
I cumulative weight of these arguments is strong enough to lead to the conclusion that the privilege should not exist. First, there is the general argument used in the case of all privileges that legal

protection of the relationship would involve the withholding of relevant evidence from a judicial tribunal and as such would be an impediment to the search for the truth and the administration of justice. This argument against the privilege is stronger in the context of the doctor-patient relationship than in the analogous clergy-communicant relationship. This is because, in practice, issues concerning medical treatment are both likely to arise in litigation (in particular in actions for damages for personal injury by motor cars and workers' compensation cases) and more likely to be the subject of such knowledge as could warrant the calling of a doctor as a witness. On the other hand, statements made to clergymen are only likely to be relevant to litigation when they constitute admissions or confessions (usually in criminal cases), and in many cases no one will know whether the admission or confession was made in the first place. In the present author's opinion, it should also be noted that it is much more likely that the privilege will be waived by the patient in a doctor-patient relationship than by a communicant in a clergy-communicant relationship. Patients, for example, who initiate personal injuries actions and call their own doctor as a witness will be taken to have impliedly waived any privilege protecting medical communications between themselves and their doctors, whereas it would be rare for a penitent to consent to the release (especially in a criminal case) of a confession made to a priest.

This first argument against a privilege has been rigorously supported by Wigmore who argues that the practical employment of the privilege in some States of America has come to mean little but the "suppression of useful truth-truth which ought to be disclosed and would never be suppressed for the sake of any inherent repugnancy in the medical facts involved'. Wigmore poses the logical question, namely, 'Is the expected injury to the relationship, through disclosure, greater than the expected benefit to justice?' His answer, of course, is an emphatic denial. Wigmore states:

> The injury is decidedly in a contrary direction. Indeed, the facts of litigation today are such that the answer can hardly be seriously doubted. Of the kinds of ailments that are commonly claimed as the subject of the privilege, there is seldom an instance where it is not ludicrous to suggest that the party cared at the time to preserve the knowledge of it from any person but the physician. From asthma to broken ribs, from influenza to tetanus, the facts of the disease are not only disclosable without shame, but are in fact often publicly known and knowable by everyone – by everyone except the appointed investigators of truth.

It is submitted by the present author that Wigmore's argument is a powerful and compelling one, and given that today claims for compensation for personal injury are still increasing (and hence an accompanying need for medical reports at the very least, if not for doctors to be called as witnesses), it seems that the creation of a doctor-patient privilege could well constitute an impediment to justice and truth.

Secondly, there is the argument that the protection of the doctor-patient relationship would discriminate against the other confidential relationships such as clergy and communicants, accountants and clients, journalists and their sources, anthropologists and their subjects etc., where one of the parties to the relationship is also under an ethical, professional or moral obligation not to disclose confidences. It is submitted that whilst it would no doubt be unfair legally to protect the doctor-patient relationship over and above any of the other relationships mentioned, it would be unlikely to occur because there is no stronger argument in favour of the protection of the doctor-patient relationship than any of the other above-named relationships. In fact, the Australian Law Reform Commission decided to treat all of these relationships on an equal footing by recommending the introduction of a general discretion to withhold from evidence confidential communications made during any of these relationships (for example, social workers, counsellors, psychotherapists, bankers etc.) where there is a likelihood of harm to the relationship. The only relationship which the Commission considered was possibly worthy of special treatment was that of clergy and communicant, but even the proposed introduction of a special privilege for that relationship, *viz.* clergy and communicant, was rejected.

A further aspect of this second argument is the claim, mainly by the medical profession, that since the secrets of the legal profession are allowed to be inviolable, the secrets of the medical profession have at least an equal title to consideration. Hence, if there is a privilege for the lawyer-client relationship there should be one for the doctor-patient relationship. This is, of course, 'no more than analogy; and nothing is more fallible than an argument from analogy. Furthermore, it is submitted that the analogy runs out very quickly. No doubt both 'privileges' would safeguard the rights of the client or patient and encourage full and frank disclosure on her or his part to the respective lawyer or doctor. It might even be said that legal professional privilege and medical professional privilege will both encourage the use of professional services (legal and medical) and enhance their quality. However, the rationale and operation of the two professions are quite different and hence the need for a privilege in one profession is not necessarily the same as the need for a privilege in the other. As Wigmore so clearly states:

> The services of an attorney are sought primarily for aid in litigation, actual or expected, while those of the physician are sought for physical cure; that hence the rendering of the legal advice would result directly and surely in the disclosure of the client's admissions if the attorney's privilege did not exist, while the physician's curative aid can be and commonly is rendered irrespective of making dislosure.

There is no doubt that these differences between the two professions exist and hence the lawyer's office has been described as the 'ante-room of the court room'. Unlike a doctor, a lawyer is a potential witness in respect of all matters in which he or she acts for a client. A further important difference is that the lawyer most often acts as a representative for a client, that is, as a mouthpiece or advocate. Hence, in much litigation it is said that the information possessed by the lawyer is secondhand; what the client and others tell her or him. This means that a privilege in favour of the lawyer-client relationship would be less an impediment to the truth than would a privilege protecting the doctor-patient relationship. In the former situation there are more likely to be other witnesses available to gain the necessary evidence, and hence the client's legal privilege is less likely to prevent direct evidence being presented to the court. It is submitted, however, that this last mentioned 'difference' between the lawyer and the doctor can quite often be refuted and possibly proved to be a superficial difference. There is reason to suggest that quite often the information possessed by the doctor is also secondhand, namely, what the patient and others tell the doctor. It is no doubt the case that the doctor's opinion is an expert one (that is, outside the field of knowledge of the ordinary layman), but it is also the case that the medical opinion is based on facts reported by the patient and/or observed by the doctor on examination. Hence, in the present author's opinion, one should be careful not to polarise beyond recognition the clear differences which do exist between the function of the lawyer and the doctor.

The third argument against the creation of a doctor-patient privilege is that such a privilege would involve serious definitional problems leading to technical and semantic distinctions being made which do not reflect the rationale behind the privilege. This has certainly been borne out in Victoria where a limited statutory privilege exists in civil cases. The creation of the privilege in Victoria has led to much controversy and to the creation of a number of exceptions. Examples of such exceptions are actions brought under Pt 111 of the Wrongs Act 1958 (Vic.) to recover

damages for the death of the patient, actions brought under the Workers' Compensation Act 1958 (Vic.) or the Accident Compensation Act 1985 (Vic.) to recover compensation for the death of the patient, and cases in which the patient's sanity or testamentary capacity is in issue. Further problems have also arisen in relation to the statutory privilege, for example, as to the meaning of the words 'any information acquired' and 'prescribing or acting', who can consent to the disclosure of the information (in particular after the death of patient), whether the privilege extends to non-curial proceedings etc. It is suggested that the many uncertainties and definitional problems which have surrounded the already limited statutory privilege in Victoria provide an argument in themselves for the abolition of the privilege.

It is submitted that the final argument against the creation of a doctor-patient privilege is the most compelling of the four arguments discussed, and in essence it consists of a refutation of the primary argument in favour of the privilege. In short, the final argument states that a privilege is not needed to induce or encourage persons to seek medical assistance. People will still go to the doctor and make full and frank disclosures even if there is no privilege. The argument from deterrence, namely, that some people will be deterred from consulting a doctor if they know their confidences would be revealed in future litigation, is simply fallacious. The Statute Law Revision Committee in Victoria, for example, was unable to find any evidence at all to support the contention that the operation of the common law in other States had any influence on the confidences of patients in physicians, nor was there a tittle of evidence to support a somewhat loosely held belief that patients withheld information from their physicians. The Victorian position (where a statutory privilege exists) was compared to the New South Wales position (where there is no privilege in existence) in the following passage from the Victorian Parliamentary Debates:

> The New South Wales doctors do not say to the Victorian doctors, 'we are not told as much by our patients because they know we can be forced to give evidence in court, whereas your patients know you cannot be and therefore give you a much fuller story'. The doctors do not suggest this, and therefore it might be said that it does not make much difference and there is a statutory protection.

There has also been research conducted in the United States on this question which indicates that people would not be deterred from seeking medical help because of the possibility of disclosure in court. It is difficult not to agree with the suggestion by the

Australian Law Reform Commission that the 'thoughts of the patient will normally be filled with the woes of his illness and the possibility of his words making their way from the surgery to the court room would rarely be a factor to curb the candour of his communications'. As Wigmore himself concluded, there need not be any fear that the absence of the privilege will 'subjectively hinder people from consulting physicians freely. The actually injured person would still seek medical aid, the honest insured would still submit to medical examination, and the testator would still summon physicians to his cure.'

In conclusion, it is submitted therefore that there are strong reasons against the creation of a doctor-patient privilege. These reasons are more compelling on balance than the arguments for the legal protection of the doctor-patient relationship. The absence of a privilege will not affect the ethical obligation of a doctor to respect the confidences of a patient outside the court room. It will therefore only be in the rare case (that is, litigation presumably not initiated by the patient) that a patient's confidence will be revealed against her or his wishes. It should also be remembered that only in a few cases would a fact communicated to a doctor be confidential in any real sense. Research has shown that both proponents and opponents of the privilege have overstated their cases and that the existence of the privilege is of consequence to few patients and in few cases. Finally, it is submitted that having no privilege at all is preferable to a privilege such as exists in Victoria which in its present statutory form would rarely be used. It is assumed therefore that consent to the release of information which has prima facie attracted the privilege in civil cases in Victoria is most often implied from the conduct of the patient in initiating legal proceedings.

In the present author's opinion therefore it is preferable to have no privilege at all than a situation which has been referred to as 'a happy medium between privilege and no privilege'. The only other ground of support for the privilege seems to be the weight of professional medical opinion pressing upon the legislature. This pressure from the medical profession could be founded on a 'natural repugnance' at having to disclose personal confidences, but it also could be simply based on the fact that doctors do not want to be troubled by having to go to court to give evidence. The simple answer to both of these suggested reasons (whichever may be correct) is that such medical pressure should be ignored because any doctor-patient privilege is understood to be for the benefit of the patient alone and not the doctor.

[100] The "Preface" to the book tells us the contents of the book written by the learned author. In all its simplicity, the learned author explained it in this way (see p. (vii)):

> Privilege is an area of the law which has developed enormously over the last decade. It has become increasingly important to ascertain whether particular pieces of information are legally protected by privilege. Privileged information cannot be revealed to a court or other body without the consent of the privilege-holder. This is not merely a matter of vital concern for legal practitioners who must invoke legal professional privilege for certain confidential communications passing between themselves and their clients. In many other relationships where confidential or professional information is exchanged a question of privilege will arise – for example, the relationships of doctor-patient, clergy-communicant and husband-wife. These privileges are all examined carefully in this book. There is also a strong case to be made for extending privilege to other relationships of confidence such as accountant-client, journalists and their sources, banker-client, psychiatrist-patient, etc. Thus far, however, the law has been reluctant to extend to other relationships the legal protection of privilege. Other extremely important privileges are also exhaustively evaluated in this book: these are the privilege against self-incrimination, without prejudice privilege and public interest immunity.
>
> The book is the first of its type – never before has there been a definitive book written exclusively on the law of privilege. The extent to which the law can and should compel disclosure of confidential communications is explored at every stage, ranging from pre-trial procedures of an interlocutory nature, to non-curial and quasi-curial proceedings of royal commissions, boards of inquiry and other administrative or executive agencies (including search warrants and Anton Piller orders) and finally to judicial proceedings (both civil and criminal) themselves. A strong emphasis is also given to the growing area of statutory attenuation and abrogation of privilege as well as to the doctrine of waiver of privilege.
>
> The book is designed to serve as an instructive and useful source of legal information not only for legal practitioners, legal academics and students, but also for the following bodies: medical practitioners and medical students, churches and religious groups, law enforcement agencies, accountants, merchant bankers/ stockbrokers, social workers, anthropologists, medico-legal bodies and psychiatrists. Indeed it is hoped that the book will represent

> an important tool for all professional organisations which have a Code of Ethics obliging the professional person to keep confidential communications with her or his client/patient etc.

[101] After reading the book written by Suzanne B. McNicol, my stand would still be the same. We do not have the proper enabling legislations along the lines of the British. We certainly do not have the right of pre-action discovery and we too do not have the right of discovery against non-parties. We are seriously handicapped, legally speaking, of course. We must subpoena experts' witnesses including medical experts to the courts in order to obtain evidence to adjudicate the cases. An expert may fortify his opinion by referring not only to any relevant research, tests or experiments which he has personally conducted, whether or not expressly for the purpose of the case, but also to other works of authority, articles, research papers, letters and other similar materials written by others and all these falling within the ambit of the field of expertise of the expert in question (*Davie v. Edinburgh Magistrates* [1953] SC 34, Court of Session; and *Seyfang v. GD Searle & Co* [1973] QB 148 at 151). A classic example would be the case of *H v. Schering Chemicals Ltd* [1983] 1 All ER 849. That was a case where the issue that arose for consideration was whether the defendants had been negligent in manufacturing and marketing a drug known as Primodos which caused personal injuries and it was held that the expert witnesses were entitled to refer to the results of the research into the drug and the articles and letters written about the drug which were published in medical journals. At p. 853 of the report, Bingham J had this to say:

> If an expert refers to the results of research published by a reputable authority in a reputable journal the court would, I think, ordinarily regard those results as supporting inferences fairly to be drawn from them, unless or until a different approach was shown to be proper.

The Second Issue – Delivery Before Trial Of Witnesses' Statements

[102] The parties were ordered to prepare and exchange their witnesses' statements in affidavit forms and this must also include the witnesses' statements of their medical experts. All these were in compliance with O. 35A r. 1 and r. 2 of the RHC.

A I have reproduced Order 35A rule 1 and rule 2 of the RHC. It provides the Court with the discretion, but only where the parties agree, to allow the evidence-in-chief by way of an affidavit but not the witness statement. It must be emphasised that no order for evidence by affidavit *in lieu* of oral evidence-in-chief may be made B without the agreement of all the parties. It does not state that reasons must be given by a party for refusing to deliver affidavit evidence. Fortunately, as the submissions unfolded, the parties advanced good and sound reasons for not agreeing to the idea of affidavit evidence or witness statement. According to section 138 (1) of the Evidence Act 1950 witnesses shall be first examined- C in-chief, then, if the adverse party so desires, cross-examined then, if the party calling them so desires, re-examined. In short, all witnesses shall be first examined-in-chief, then may be cross-examined and re-examined – all done orally.

D **[103]** A trial must be conducted in open court where members of the public would have access. The taking and the recording of the evidence by the presiding judge forms part and parcel of the trial. Witnesses must therefore come forward and give oral evidence in a court of law in the presence of the presiding judge. Everything must be done in a transparent manner. The members of the public E are not excluded. Section 15 of the Courts of Judicature Act 1964 (Act 91) enacts as follows:

15. Courts to be open and public.

F (1) The place in which any Court is held for the purpose of trying any cause or matter, civil or criminal, shall be deemed an open and public court to which the public generally may have access:

Provided that the Court shall have power to hear any cause or G matter or any part thereof in camera if the Court is satisfied that it is expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason so to do.

(3) A Court may at any time order that no person shall publish the name, address or photograph of any witness in any cause or H matter or any part thereof tried or held or to be tried or held before it, or any evidence or any other thing likely to lead to the identification of any such witness; and any person who acts in contravention of any such order shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years I or to both.

[104] There is a passage that appears in *Halsbury's Laws of England*, 4th edn, vol. 37, at para. 452, at p. 340 which merits reproduction. It is this:

> the evidence of witnesses must be by examination of the witnesses orally in open court, for this is a fundamental rule of the law of evidence which ensures that trials with witnesses will ordinarily take place in public.

[105] It is apparent that a court of law will be conducted in an orderly manner according to the set rules and procedures. There is certainly a great scope for abuse if a witness evidence is recorded by some one other than a judge and in a private place.

[106] In Britian, enabling legislation was passed by Parliament to provide for written statements of witnesses to be given in advance of the trial. But not in substitution of oral evidence at the trial. The trial judge may on such terms as he thinks fit direct that such statements should stand as evidence-in-chief or be part of the evidence-in-chief. Such direction, however, cannot be given before trial.

[107] In Britian too, extensive provisions were introduced to provide safeguards and to prevent a miscarriage of justice when witnesses statements are being prepared or used. There is, unfortunately, no such safeguard in Malaysia.

[108] At this juncture, by way of a comparison, I shall reproduce s. 2 of the Civil Evidence Act 1968 and it is worded thus:

> Admissibility of out-of-court statements as evidence of facts stated
>
> 2. (1) In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.
>
> (2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person by whom the statement was made, the statement:
>
> (a) shall not be given in evidence by virtue of this section on behalf of that party without the leave of the court; and

A (b) without prejudice to paragraph (a) above, shall not be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination-in-chief of the person by whom it was made, except:

B (i) where before that person is called the court allows evidence of the making of the statement to be given on behalf of that party by some other person; or

C (ii) in so far as the court allows the person by whom the statement was made to narrate it in the course of his examination-in-chief on the ground that to prevent him from doing so would adversely affect the intelligibility of his evidence.

D (4) Where in any civil proceedings a statement which was made otherwise than in a document is admissible by virtue of this section, no evidence other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it:

E Provided that if the statement in question was made by a person while giving oral evidence in some other legal proceedings (whether civil or criminal) it may be proved in any manner authorised by the court.

[109] I will now reproduce ss. 2 and 3 of the Civil Evidence Act 1972. They are worded as follows:

F **Rules of court with respect to expert reports and oral expert evidence**

G 2. (1) If and so far as rules of court so provide, subsection (2) of section 2 of the Civil Evidence Act 1968 (which imposes restrictions on the giving of a statement in evidence by virtue of that section on behalf of a party who has called or intends to call as a witness the maker of the statement) shall not apply to statements (whether of fact or opinion) contained in expert reports.

H (2) In so far as they relate to statements (whether of fact or opinion) contained in expert reports, rules of court made in pursuance of subsection (1) of section 8 of the Civil Evidence Act 1968 as to the procedure to be followed and the other conditions to be fulfilled before a statement can be I given in evidence in civil proceedings by virtue of section 2 of that Act (admissibility of out-of-court statements) shall not be subject to the requirements of subsection (2) of the said

section 8 (which specifies certain matters of procedure for which provision must ordinarily be made by rules of court made in pursuance of the said subsection (1)).

(3) Notwithstanding any enactment or rule of law by virtue of which documents prepared for the purpose of pending or contemplated civil proceedings or in connection with the obtaining or giving of legal advice are in certain circumstances privileged from disclosure, provision may be made by rules of court:

(a) for enabling the court in any civil proceedings to direct, with respect to medical matters or matters of any other class which may be specified in the direction, that the parties or some of them shall each by such date as may be so specified (or such later date as may be permitted or agreed in accordance with the rules) disclose to the other or others in the form of one or more expert reports the expert evidence on matters of that class which he proposes to adduce as part of his case at the trial; and

(b) for prohibiting a party who fails to comply with a direction given in any such proceedings under rules of court made by virtue of paragraph (a) above from adducing in evidence by virtue of section 2 of the Civil Evidence Act 1968 (admissibility of out-of-court statements) except with the leave of the court, any statement (whether of fact or opinion) contained in any expert report whatsoever in so far as that statement deals with matters of any class specified in the direction.

(5) Provision may be made by rules of court as to the conditions subject to which oral expert evidence may be given in civil proceedings.

(6) Without prejudice to the generality of subsection (4) above, rules of court made in pursuance of that subsection may make provision for prohibiting a party who fails to comply with a direction given as mentioned in subsection (3)(b) above from adducing, except with the leave of the court, any oral expert evidence whatsoever with respect to matters of any class specified in the direction.

(6) Any rules of court made in pursuance of this section may make different provisions for different classes of cases, for expert reports dealing with matters of different classes, and for other different circumstances.

(7) References in this section to an expert report are references to a written report by a person dealing wholly or mainly with matters on which he is (or would if living be) qualified to give expert evidence.

(8) Nothing in the foregoing provisions of this section shall prejudice the generality of section 75 of the County Courts Act 1984, section 144 of the Magistrates' Courts Act 1980 or any other enactment conferring power to make rules of court; and nothing in section 75(2) of the County Courts Act 1984 or any other enactment restricting the matters with respect to which rules of court may be made shall prejudice the making of rules of court in pursuance of this section or the operation of any rules of court so made.

Admissibility of expert opinion and certain expressions of non-expert opinion

3. (1) Subject to any rules of court made in pursuance of Part 1 of the Civil Evidence Act 1968 or this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.

(2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.

(3) In this section 'relevant matter' includes an issue in the proceedings in question.

[110] This would be followed by the commentaries that appear in *"The Supreme Court Practice"* 1997 edn, vol. 1, Part 1 at p. 653 in these words:

Witness called or not called at trial – Notwithstanding the pre-trial exchange of the other statements of the witnesses between the parties, whether pursuant to the direction under para. (2), or by consent, the trial itself remains an oral, public trial. The written statement of a witness is not in itself evidence of the case. The trial Judge may, on such terms as he thinks fit, direct that the statement of the witness should stand as the evidence in chief of that witness or part of such evidence (para. (7)(a)). Whether the statement of the witness is directed to stand as his evidence in chief or his testimony is elicited orally at the trial, he will be

subject to oral cross-examination by the opposite party under O. 38, r. 1 who will have the advantage that he will have known in advance what the witness was going to say in his evidence in chief (see *Jacob, op. cit.*). In the absence of such a direction, the party calling the witness must elicit his evidence by his oral examination-in-chief in the ordinary way under O. 38, r. 1.

[111] In short, in Britian, the trial remains an "oral, public hearing" and "the written statement of a witness is not in itself evidence of the case." And that "witnesses statements which have been exchanged ... are not put in evidence by the fact of exchange". Whereas in Malaysia, by virtue of O. 38 r. 1 of the RHC, witnesses shall be examined "orally and in open court" "subject to the provisions of these rules and of the Evidence Act 1950."

It is ideal to refer to Order 38 of the RHC which states as follows:

2. Evidence by affidavit (O. 38 r. 2)

(1) The Court may, at or before the trial of an action begun by writ, order that the affidavit of any witness may be read at the trial if in the circumstances of the case it thinks it reasonable so to order.

(2) An order under paragraph (1) may be made on such terms as to the filing and giving of copies of the affidavits and as to the production of the deponents for cross-examination as the Court thinks fit but, subject to any such terms and to any subsequent order of the Court, the deponents shall not be subject to cross-examination and need not attend the trial for the purpose.

(3) In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

[112] And the commentaries can be seen in the *"Malaysian High Court Practice"*, 2003 Desk edn at p. 1248:

In *Abdul Halim bin Abdul Hanan & Ors v. Pengarah Penjara Taiping & Ors* [1996] 4 MLJ 54, the court held per curiam that even where the plaintiffs had begun the action by originating summons instead of by writ, 'it was still open for them … at the very least to apply under O. 38 r. 2(3) to cross examine the deponents of the … affidavit, although such emergency repairs are not usually condoned by the courts which may disallow any such application.' See also *Kepong Industrial Park Sdn Bhd & Ors v. Teoh Seng Aun & Ors (No 3)* [2000] 4 MLJ 614.

Under O. 38 r. 2, a wide discretion is given to the court at or before a trial begins by writ as to whether the court should make an order that the affidavit of any witness may be read at the trial. The rule clearly says that the court may exercise the discretion according to the circumstances of the case and whether it is reasonable to make such an order: *UMBC Finance Ltd v. Woon Kim Yan Robin* [1990] 3 MLJ 360; *Welch & Anor v. Britannia Industries Ptd Ltd* [1993] 1 SLR 673.

[38.2.2] Circumstances of the case

The use of affidavits as provided for in r. 2(1) is of great value, especially in circumstances where the witness is abroad and therefore not available for the trial or where the evidence is uncontested: *UMBC Finance Ltd v. Woon Kim Yan Robin* [1990] 3 MLJ 360. The court will therefore probably not make the order where it is clear that the evidence will be strongly contested or the credibility is dependent on the court's view of the witness, or where by its very nature the evidence needs to be examined closely and its very admissibility yet to be determined: *Bonhote v Henderson* [1895] 1 Ch 742; *Constantinidi v. Ralli* [1935] Ch 427.

[113] Hashim Yeop A Sani CJ (Malaya) in *UMBC Finance Ltd v. Woon Kim Yan Robin* [1990] 3 MLJ 360, SC, had this to say of O. 38 r. 2 of the RHC (see p. 361 of the report):

Order 38 r. 2 is taken from the equivalent English rule. This rule is used normally for a witness who is abroad and therefore not available for the trial or where the evidence is uncontested. An order under O. 38 r. 2 should not be made if the evidence is strongly contested, or where the evidence relates closely to the credibility of the witness, or where by its very nature the evidence needs to be examined closely and its very admissibility yet to be determined.

In our view it is not a proper exercise of discretion to allow evidence under O. 38 r. 2 where the evidence is highly contentious and its admissibility is in issue.

[114] Be that as it may, O. 35A r. 1 of the RHC is contrary to s. 138(1) of the Evidence Act 1950 and s. 15 of the Courts of Judicature Act 1964 (Act. 91). In my judgment, any subsidiary legislation which is inconsistent with an Act of Parliament is void to the extent of the inconsistency as envisaged in s. 23(1) of the Interpretation Acts 1948 and 1967 (Act 388). In *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413, 420, CA, Gopal Sri Ram JCA aptly said that:

> A rule of court should not be interpreted in such a way as to result in unfairness or produce a manifest injustice.

[115] Since I have ruled that O. 35A of the RHC is void by reason of inconsistency, it follows that there is no statutory provision by which the court may order an affidavit to be made or be affirmed for use at the trial. It may, where justice requires, order an affidavit which is already made or affirmed to be read at the trial. But if the affidavit evidence that is sought to be admitted is highly contentious as explained by Hashim Yeop A Sani CJ (Malaya) in *UMBC Finance Ltd v. Woon Kim Yan Robin (supra)*, then it will be denied. There, the defendant-respondent had applied to read the affidavit of a witness who was a witness who had been subpoenaed for the trial but who has since died. The application was made under O. 38 r. 2 of the RHC. The application was allowed by the learned judicial commissioner and the appellant appealed. The Supreme Court allowed the appeal and refused to admit the affidavit evidence of the deceased.

[116] Moreover, the duty of the plaintiff to give evidence arises only at the trial proper and not before the trial. Order 35 r. 4(2) of the RHC states that "the plaintiff shall begin by opening his case" and by virtue of O. 35 r. 4(3) of the RHC "the plaintiff may, after the evidence on his behalf has been given, make a second speech closing his case and the defendant shall then state his case". A defendant is not obliged to give evidence and he is also not obliged to deliver witnesses statements in advance of the trial. A defendant may, at the close of the plaintiff's case at the trial, elect not to give evidence (r. 4(3) of O. 35 of the RHC).

[117] So, procedurally speaking, the evidence of the witnesses shall be given orally at the trial. And the recording of such evidence constitutes a judicial function. The same is also true when it comes to writing a judgment. These functions cannot be delegated to

anyone and it must be performed by the judges themselves. As Siti Norma Yaakob JCA (now Chief Judge of Malaya) puts it in *Far East Food Industries Sdn Bhd v. PT Anekapangan Dwitama* [1997] 3 MLJ 805, 811:

> In the exercise of his judicial functions, a judge does a balancing exercise when deciding and resolving disputes between opposing parties or interests. Thus, hearing a case, making a decision on the case and supporting a decision with reasoned arguments and findings by way of an oral or written judgment form part and parcel of a judge's judicial acts or functions. The most important characteristic of his judicial functions is the exercise of independent judgment and discretion. It is for this very reason that a judge cannot, under any circumstance, delegate any of his judicial functions to anybody for whatever reason whatsoever. In the exercise of his judicial functions, a judge is expected to do justice to the parties appearing before him. He cannot do so if he appears to be partial to any party as justice must not only be done but must be seen to have been done.

[118] What Denning LJ said in *Barnard & Others v. National Dock Labour Board & Another* [1953] 1 All ER 1113 at p. 1118 merits reproduction:

> While an administrative function can often be delegated, a judicial function rarely can be. No judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication.

[119] It is interesting to read the case of *Tameshwar And Another v. Reginam* [1957] 2 All ER 683 because it shows the need for the judge to be present when the jury and some witnesses visited the scene of the crime. The facts of that case may be stated as follows. At the trial of two prisoners in British Guiana on charges of robbery with aggravation the jury requested a view of the scene of the robbery and asked that five witnesses should attend. The view was held in the presence of the accused, a superintendent of police, counsel for the prosecution and counsel for one accused. The jury were checked by the judge before leaving for the view and were warned not to have any communication or to engage in any discussion or argument. The judge did not attend the view. At the view, the four witnesses pointed out various places. In addition three other witnesses were also present. On the following day, the trial was resumed. Evidence was given of what had happened at the view and the

witnesses were available for cross-examination. The prisoners were found guilty. It was held by the Privy Council, with a coram of Earl Jowitt, Lord Tucker and Lord Denning, that the absence of the judge at the view was a defect which vitiated the trial.

[120] Lord Denning who wrote the judgment of the Privy Council made some very pertinent observations which must be re-produced here. At p. 686, Lord Denning said:

> and that the judge and jury must be present throughout the giving of the evidence and every part of it, so as to be able to appreciate it and assess its worth: and throughout the speeches of counsel too.

[121] And at p. 687, his Lordship said that:

> the fundamental principles of a fair trial; and one of these principles is that every piece of evidence given by a witness must be given in the presence of the tribunal which tries the case.

[122] Finally, at p. 688, his Lordship aptly said:

> Their Lordships think it plain that if a judge retired to his private room whilst a witness was giving evidence, saying that the trial was to continue in his absence, it would be a fatal flaw.

[123] Another case worth referring to is the case of *Fulker v. Fulker* [1936] 3 All ER 636. There Langton J remarked that (see p. 640):

> It was most important that all the justices adjudicating upon the evidence on which they were to make their findings should hear that evidence and not have it communicated to them through the medium of the justices' clerk's note.

[124] This would be followed by the case of *Tan Boon Chee, David v. Medical Council Of Singapore* [1980] 2 MLJ 116, 117, where Choor Singh J made these salient observations:

> It is quite clear that some members of the Medical Council who took part in the Council's determination did not hear the full evidence and all the submissions made. A person who has not seen and heard a witness is as a rule quite incapable of estimating the value of his evidence. It was therefore most improper for members of the Council to walk in and out of the Inquiry while evidence was being recorded or to be absent altogether. Such conduct is not only improper and unfair to the practitioner whose conduct is the subject matter of the Inquiry but it also tends to destroy confidence in the fairness of the Council's decisions.

A Justice must be rooted in confidence and confidence is destroyed when right-minded people get the impression that the Medical Council did not give the practitioner a proper hearing. As was observed by Lord Hewart CJ in *R. v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256:

B > It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done …

[125] *Halsbury's Laws of England*, 4th edn, vol. 17 carries a passage C at p. 23 that merits reproduction. It is this:

> Oral evidence given in open court by witnesses whose demeanour and deportment have been observed is preferable to evidence given by witnesses out of court, especially in matrimonial cases, and consequently appellate tribunals are slow to interfere with the D decisions of inferior courts on questions of fact or oral testimony.

[126] Buttrose J in *Phang Moh Shin v. Commissioner Of Police & Ors.* [1967] 2 MLJ 186 criticised the use of pre-recorded witness statements when he said at p. 189 of the report:

E > The only possible interpretation I am able to place on this regulation read as a whole is that all the evidence must be given and recorded in the presence of the officer concerned and all exhibits seen by him.

F **[127]** The questioning of witnesses must be done in open court before the trial judge. In examination-in-chief, the party calling the witness will seek to elicit evidence which supports his version of the facts in issue. While cross-examination is the questioning of a witness by the opponent of the party calling him or by any other G party to the proceedings (*R v. Sharp* [1993] 3 All ER 225, CA; and *R v. Roncoli* [1998] Crim LR 584, CA). All witnesses are certainly liable to be cross-examined. In cross-examination, a party may seek to cast doubt upon the witness's evidence-in-chief. This may be done by asking the witness about his previous inconsistent H statements, about his prejudice, bias or general reputation for untruthfulness. In *R v. Sweet-Escott* [1971] 55 Cr App R 316 at 320, Lawton J had this to say:

> Since the purpose of cross-examination as to credit is to show that the witness ought not to be believed on oath, the matters I about which he is questioned must relate to his likely standing after cross-examination with the tribunal which is trying him or listening to his evidence.

[128] The failure to cross-examine would amount to a tacit acceptance of the witness's evidence-in-chief. A cross-examiner who desires to suggest that the witness is not speaking the truth on a particular matter must lay the proper foundation by putting the matter to the witness so that he has an opportunity of giving an explanation which is open to him.

[129] The object of re-examination is to repair such damage as has been done by the cross-examining party. It is a cardinal rule of re-examination that the questioning must be confined to those matters that arose out of cross-examination (*R v. Beezley* [1830] 4 C & P 220).

[130] As demonstrated, the questioning of the witnesses would certainly provide an avenue for the parties to ventilate and air their grievances in open court before the trial judge. Justice would be done and the parties would be satisfied that they had their day in court. In sharp contrast, if evidence is prepared in the form of a witness statement in the privacy of a lawyer's office from which the trial judge and the other parties and their lawyers are excluded, there is no opportunity for the trial judge or the other parties and their counsel to observe the demeanour of the witness while being examined-in-chief. There would be all round dissatisfaction. The trial judge, the parties and their counsel would be deprived of observing the reaction of the witness in regard to an exhibit or observing the witness demonstrate something. There would also be no opportunity to object to matters like competency of the witness (perhaps in regard to the unsoundness of mind), the issues pertaining to relevancy, hearsay, inadmissibility, leading questions and harassment. There would certainly be ample opportunity for a miscarriage of justice to occur. It is for these varied reasons that s. 73A(3) of the Evidence Act 1950 provides in effect that a witness statement is inadmissible if it is "made by a person interested at a time when proceedings were pending or anticipated."

[131] It must be borne in mind that the lawyer and his staff while recording and taking the statements from the witnesses would be assisting them. Thus, the lawyer and his staff would become witnesses themselves. They should, by right, be called to give evidence.

[132] And as far as the witnesses who need interpreters, difficulties would arise in regard to the qualifications of the interpreters. An interpreter would have to take an oath before interpreting a witness's evidence. It would be wrong for counsel or his clerk to act as the interpreter. It would also be wrong to use the services of an interpreter engaged by a party. The interpreter must be engaged by the court. Towards this end, the sound observations of Spenser Wilkinson J, who wrote the judgment in *Cheong See Leong v. Public Prosecutor* [1948-49] MLJ Supp 56, a decision of the Court of Appeal with a coram of Willan CJ, Spenser Wilkinson and Russell JJ, should be referred to. There his Lordship Spenser Wilkinson J, succinctly said (see p. 57 to p. 58 of the report):

> The next question which is the first one raised by the learned trial Judge in the extract quoted above is whether the statement of the appellant was made "to the Inspector" within the meaning of the Regulation. The only practicable way in which one person can make a statement to another in a language that the latter does not understand is either by signs or through interpretation. In the ordinary way an independent interpreter is, as the learned trial Judge pointed out, uninterested in the subject matter and may be taken as being a mere "conduit-pipe" incapable of invention to the detriment of the accused. A statement thus made through a mere "conduit-pipe" by an accused to a Police Inspector is, in our view a statement properly made by him to the Inspector.
>
> If, however, the interpreter used, instead of being a mere "conduit-pipe" has an interest in the subject matter then we are brought to the consideration of the second point raised by the learned trial Judge in the extract above quoted that he might be open to a temptation to improve or embellish the case. We must, therefore, consider the effect of such a possibility upon the proceedings.
>
> There are numerous decided cases which have laid down the principle that judicial officers are required to be free from bias when adjudicating on any particular case before them. Those cases have decided that when a judicial officer is interested in the subject matter of any case before him the presumption is that he cannot be free from bias. It may be, in such a case, that his adjudication has been free from all bias. That is not the test. The test is whether there is a likelihood of bias arising from his interest in the subject matter. If there is that likelihood then his adjudication cannot stand. In other words, the test is whether a judicial officer

is so interested in the case and he should not have sat to adjudicate upon it. We think that the same principles must be applied in regard to interpreters in a case such as this.

The only authority which was cited to us on the question of interpretation was the case of *Ah Soi v. King-Emperor* AIR [1926] Calcutta 922. In that case a witness who had personally interested himself in the Police investigations and himself gave evidence before the committing Magistrate and again in the Sessions Court was used as interpreter for the other witnesses in the latter Court. In the judgment in that case the following remark was made:

> The procedure adopted by the learned Sessions Judge has had the effect of placing the accused more or less at the mercy of the interpreter …

It was held that the procedure adopted was opposed to elementary ideas of justice.

In the case before us the statement of the appellant was interpreted by Detective Sergeant No. 180 who, as appears from the record, was fully conversant with all the material facts and was subsequently called by the prosecution as their principal witness to prove those facts. Accordingly there is no doubt that he had a real interest in the subject matter of that statement. Hence applying the above-mentioned test there was the likelihood of bias when he interpreted.

We have no doubt this offends against the elementary ideas of justice and therefore no reliance can be placed on the accuracy of that statement. Without it as found in the learned trial Judge there is not sufficient evidence to support the conviction.

[133] And the requirement that an interpreter is required to take an oath before interpreting a witness's evidence is supported by s. 6 of the Oaths And Affirmations Act 1949 (Act 194) which enacts as follows:

6. Persons by whom oaths are to be taken.

(1) Subject to section 7, oaths shall be taken by the following persons:

(a) witnesses, that is to say, all persons who may be lawfully examined, or give or be required to give evidence, by or before any court or person having, as mentioned in section 4, authority to examine such person or to receive evidence;

A

(b) interpreters of questions put to and of evidence given by witnesses;

(c) translators; and

(d) jurors.

B

(2) Nothing herein contained shall render it necessary to administer to the official interpreter of any court, or to a certified interpreter in the employment of the Government of Malaysia or of any State Government when he is engaged in the performance of his duties, after such official or

C

certified interpreter has entered on the duties of his office, an oath that he will faithfully discharge those duties.

[134] Currently, there is no provision in any statute to compel a witness to give a witness statement to a party or his solicitor

D

before trial. Some witnesses – especially the medical experts, may be reluctant to give a pre-trial statement or may refuse to answer certain questions out of court. It would be wrong to order the parties to produce witnesses statements if the witnesses refused to co-operate.

E

[135] However, there are provisions in the RHC for a subpoena to be issued to compel a witness to attend court to give evidence. I shall reproduce them hereinunder:

14 Form and issue of writ of subpoena (O. 38 r. 14)

F

(1) A writ of subpoena must be in Form 67, 68 or 69 whichever is appropriate.

(2) Issue of a writ of subpoena takes place upon its being sealed by an officer of the Registry.

G

(3) Before a writ of subpoena is issued a praecipe in Form 70 for the issue of the writ must be filed in the Registry; and the praecipe must contain the name and address of the party issuing the writ, if he is acting in person, or the name of firm and business address of that party's solicitor.

H

15 More than one name may be included in one writ of *subpoena ad testificandum* (O. 38 r. 15)

The names of two or more persons may be included in one writ of subpoena ad testificandum.

I

16 Writ of subpoena duces tecum (O. 38 r. 16)

(1) A writ of subpoena duces tecum must contain the name of one person only.

(2) Any person served with a writ of subpoena duces tecum shall sufficiently comply if he causes the document to be produced without attending personally.

17 Amendment of writ of subpoena (O. 38 r. 17)

Where there is a mistake in any person's name or address in a writ of subpoena, then if the writ has not been served, the party by whom the writ was issued may have the writ re-sealed in correct form by filing a second praecipe under rule 14(3) indorsed with the words "Amended and re-sealed".

18 Service of writ of subpoena (O. 38 r. 17)

(1) Unless the Court otherwise orders, a writ of subpoena must be served personally and the service shall not be valid unless effected within 12 weeks after the date of issue of the writ.

(2) A writ of subpoena shall not be served on any person outside the jurisdiction.

19 Duration of writ of subpoena (O. 38 r. 19)

A writ of subpoena continues to have effect until the conclusion of the trial at which the attendance of the witness is required.

20 Court records (O. 38 r. 20)

(1) An officer of the High Court or of any Subordinate Court shall not be required by a writ of subpoena duces tecum to produce the records of the Court.

(2) If the original of any record of a Court or of any document filed in such Court is for any special reason required, a request for production thereof may, on the application of the party requiring the same, be addressed by the Registrar to the Court.

(3) No mark shall be placed upon any record or document produced under this rule.

[136] It must be borne in mind that difficult and complicated questions may arise at the trial proper as to whether a witness was forced, induced or misled into saying something in his witness statement that was recorded in the comfort of the lawyer's office. It is for these reasons that witnesses should give evidence in court at the trial proper where members of the public could and are allowed to attend.

[137] I venture to say, with respect, that a witness statement, even in affidavit form, is practically worthless. The Evidence Act 1950 does not apply to affidavits presented to any court and this is clearly set out in s. 2 of the same Act. For convenience, I shall now re-produce s. 2 of the Evidence Act 1950:

> **2. Extent.**
>
> This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.

[138] The safeguards provided for in the Evidence Act 1950 so as to make the court the sanctuary of truth would totally disappear if witnesses statements are admitted *in lieu* of oral evidence-in-chief. If the witness is unable to attend the trial, or has died, the "best evidence rule" may be applied so as to allow the admission of the next best evidence, perhaps a written statement given by the witness to a certain party or his solicitors before trial. Lord Hardwicke in *Omychund v. Barker* [1745] 1 Atk 21 at 49 remarked that:

> the judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow.

[139] It is a fallacy to think that a witness statement, whether in the form of a question and answer format or not, is the record of the oral evidence given by the witness during the trial before the trial judge. Cross-examination of a witness on his witness statement pre-recorded in private in the comfort of the lawyer's air conditioned office, which is ordered to stand as the witness's evidence-in-chief, is not an adequate safeguard.

[140] Since time immemorial, the general rule for both civil and criminal trials is this. That any fact which needs to be proved by the evidence of witnesses is to be proved by their oral evidence given in open court and accessible to members of the public.

Effective cross-examination by counsel of a witness often depends on the trial judge who has observed the witness during examination-in-chief. Usually, the cross-examiner may seek to show that the witness ought not to be believed on oath. The cross-examiner, in order to achieve the desired result, would ask the following questions:

(1) questioning the witness in regard to his knowledge of the facts to which he has testified in examination-in-chief by challenging the quality of his memory or his powers of perception of certain facts; and

(2) questioning the witness in an attempt to seek an explanation in regard to any mistakes, omissions, inconsistencies of the evidence tendered in examination-in-chief.

[141] Such questioning is solely to shake the credit of the witness and ultimately showing to the trial judge that the witness ought not to be believed. If the witness's testimony is inconsistent with the previous statement made by him, the previous statement may be put to him in cross-examination.

[142] As I said earlier, after cross-examination, the witness may be re-examined. And re-examination is the surest way to clarify or explain any matters which arose in cross-examination.

[143] The sum total of it all would be this. Oral testimony in court would ensure that justice is seen to be done.

[144] It may be argued that it is convenient to treat the affidavit tendered as the evidence-in-chief of the witness and that is what O. 35A of the RHC is all about. But Lord Atkin in *General Council of Medical Education And Registration Of The United Kingdom v. Spackman* [1943] 2 All ER 337, aptly and rightly commented at p. 341 that:

> Convenience and justice are often not on speaking terms.

[145] It was quite reasonable that the parties had reservations to prepare and exchange their witnesses' statements in affidavit forms which must also include the witnesses statements of their medical experts. There were advantages in preparing and exchanging witnesses statements in affidavit forms because it would certainly expedite the trial as well as minimise costs and expenses which

A can be substantial depending on the nature and subject matter of the case. A lengthy trial and substantial costs and expenses more often than not is quite common in medical negligence cases. But despite the merits of having an O. 35A of the RHC, its legality has now been questioned as reflected in this judgment.

B

[146] It is ideal, at this juncture, to refer, once again, to the CPR 1998 by way of an analogy.

[147] Part 22 of the CPR 1998 relates to "Statements Of Truth". It is said that the justification for the requirement that a witness C statement should be verified lies in the guarantee that the statement is made with an honest belief as to the accuracy of its contents. Rule 22.1 of the CPR 1998 states that any statement of case, any response complying with an order under r. 18.1 to provide further information and any witness statement must be D verified by a statement of truth. Rules 22.2 and 22.3 of the CPR 1998 explain and elaborate the consequences which may follow from a failure to verify any statement of case or witness statement.

[148] Rule 22.3 of the CPR 1998 provides that a witness E statement which is not verified by a statement of truth and signed by the maker of the statement may be rendered inadmissible as evidence. While r. 22.4 of the CPR 1998, on the other hand, sets out the court's power to require a document to be verified. For convenience, I will now reproduce rr. 22.1, 22.2, 22.3 and 22.4 F of the CPR 1998:

> Documents to be verified by a statement of truth
>
> 22.1 (1) The following documents must be verified by a statement of truth:
>
> G
>
> (a) a statement of case;
>
> (b) a response complying with an order under rule 18.1 to provide further information;
>
> H
>
> (c) a witness statement;
>
> (d) an acknowledgement of service in a claim begun by way of the Part 8 procedure;
>
> (e) a certificate stating the reasons for bringing a I possession claim or a landlord and tenant claim in the High Court in accordance with rules 55.3(2) and 56.2(2); and

(f) any other document where a rule or practice direction requires.

(2) Where a statement of case is amended, the amendments must be verified by a statement of truth unless the court orders otherwise. (Part 17 provides for amendments to statements of case.).

(3) If an applicant wishes to rely on matters set out in his application notice as evidence, the application notice must be verified by a statement of truth.

(4) Subject to paragraph (5), a statement of truth is a statement that:

(a) the party putting forward the document; or

(b) in the case of a witness statement, the maker of the witness statement, believes the facts stated in the document are true.

(5) If a party is conducting proceedings with a litigation friend, the statement of truth in:

(a) a statement of case;

(b) a response; or

(c) an application notice,

is a statement that the litigation friend believes the facts stated in the document being verified are true.

(6) The statement of truth must be signed by:

(a) in the case of a statement of case, a response or an application:

(i) the party or litigation friend; or

(ii) the legal representative on behalf of the party or litigation friend; and

(b) in the case of a witness statement, the maker of the statement.

(7) A statement of truth which is not contained in the document which it verifies, must clearly identify that document.

(8) A statement of truth in a statement of case may be made by:

(a) a person who is not a party; or

(b) by two parties jointly,

where this is permitted by a relevant practice direction.

Failure to verify a statement of case

22.2 (1) If a party fails to verify his statement of case by a statement of truth:

(a) the statement of case shall remain effective unless struck out; but

(b) the party may not rely on the statement of case as evidence of any of the matters set out in it.

(2) The court may strike out a statement of case which is not verified by a statement of truth.

(3) Any party may apply for an order under paragraph (2).

Failure to verify a witness statement

22.3 If the maker of a witness statement fails to verify the witness statement by a statement of truth the court may direct that it shall not be admissible as evidence.

Power of the court to require a document to be verified

22.4 (1) The court may order a person who has failed to verify a document in accordance with rule 22.1 to verify the document.

(2) Any party may apply for an order under paragraph (1).

[149] In Malaysia, we do not have the equivalent of rr. 22.1, 22.2, 22.3 and 22.4 of the CPR 1998. Our RHC is silent on it.

[150] In Britain, there is a Practice Direction governing "Statements of Truth". And that Practice Direction supplements the CPR 1998 especially its Part 22 thereof. It contains matters affecting and itemising what are the documents that require to be verified by a statement of truth. It also sets out the format of the statement of truth and it is worded in this way:

Form of the statement of truth

2.1 The form of the statement of truth verifying a statement of case, a response, an application notice or a notice of objections should be as follows:

[I believe] [the (claimant or as may be) believes] that the facts stated in this [name document being verified] are true.

2.2 The form of the statement of truth verifying a witness statement should be as follows:

I believe that the facts stated in this witness statement are true.

2.3 Where the statement of truth is contained in a separate document, the document containing the statement of truth must be headed with the title of the proceedings and the claim number. The document being verified should be identified in the statement of truth as follows:

(1) claim form: 'the claim form issued on [date]',

(2) particulars of claim: 'the particulars of claim issued on [date]',

(3) statement of case: 'the [defence or as may be] served on the [name of party] on [date]',

(4) application notice: 'the application notice issued on [date] for [set out the remedy sought]',

(5) witness statement: 'the witness statement filed on [date] or served on [party] on [date]'.

[151] Germane to the occasion at hand would be r. 32.2 of the CPR 1998. It states as follows:

Evidence of witnesses – general rule

32.2 (1) The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved:

(a) at trial, by their oral evidence given in public; and

(b) at any other hearing, by their evidence in writing.

(2) This is subject:

(a) to any provision to the contrary contained in these Rules or elsewhere; or

(b) to any order of the court.

[152] Broadly stated, it states that the evidence at the trial should be by way of an oral evidence and evidence at any other hearing should be by way of an evidence in writing. Just like the English, Malaysian law has placed great weight on evidence given by witnesses in open court on oath. But there is r. 32.4 of CPR 1998 which requires the court to direct any party at any stage of the proceedings to serve the witness statement. It states as follows:

> Requirement to serve witness statements for use at trial
>
> 32.4 (1) A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally.
>
> (2) The court will order a party to serve on the other parties any witness statement of the oral evidence which the party serving the statement intends to rely on in relation to any issues of fact to be decided at the trial.
>
> (3) The court may give directions as to:
>
> (a) the order in which witness statements are to be served; and
>
> (b) whether or not the witness statements are to be filed.

[153] In the Final Report of Lord Woolf, it was stated at p. 130 that witness statements should, as far as possible, be in the witness's own words and that it should not discuss any legal propositions nor should it comment on documents. In short, a witness statement should be drafted in the witness's own words and should be restricted to matters to which the witness himself could readily speak of if the witness is being cross-examined on it. I have been advised that in Britian there is the Civil Evidence Act 1995 (not the 1972 version which has been alluded to earlier) which generally allows hearsay evidence to be admissible in civil proceedings thereby relieving legal practitioners of the task of editing witness statements in order to remove the hearsay evidence. Under s. 2(1) of the Civil Evidence Act 1995, a party proposing to adduce hearsay evidence in civil proceedings is obliged to give notice of his intention to do so. There is no Malaysian equivalent to the Civil Evidence Act 1995. Now, r. 32.5 of the CPR 1998 states as follows:

Use at trial of witness statements which have been served

32.5 (1) If:

(a) a party has served a witness statement; and

(b) he wishes to rely at trial on the evidence of the witness who made the statement,

he must call the witness to give oral evidence unless the court orders otherwise or he puts in the statement as hearsay evidence.

(Part 33 contains provisions about hearsay evidence.)

(2) Where a witness is called to give oral evidence under paragraph (1), his witness statement shall stand as his evidence in chief unless the court orders otherwise.

(3) A witness giving oral evidence at trial may with the permission of the court:

(a) amplify his witness statement; and

(b) give evidence in relation to new matters which have arisen since the witness statement was served on the other parties.

(4) The court will give permission under paragraph (3) only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement.

(5) If a party who has served a witness statement does not:

(a) call the witness to give evidence at trial; or

(b) put the witness statement in as hearsay evidence, any other party may put the witness statement in as hearsay evidence.

[154] It is said that the parties are required to serve their witness statements on the opposite parties in advance of the trial for the purposes of promoting settlement and avoiding surprise. And during the trial proper, the witness statement of the witness should stand as his evidence-in-chief for the sole purpose of reducing the trial time. In *Mander v. Evans* [2001] 1 WLR 2378, Ferris J refused to allow a party to elaborate in evidence-in-chief on his witness statement in order to remedy the inherent

deficiencies but the learned judge agreed to try questions of law involved as a preliminary issue thereby saving the party the trouble and expense of preparing supplemental witness statement.

I will now reproduce the relevant rules in the CPR 1998. They are as follows:

Witness summaries

32.9 (1) A party who:

(a) is required to serve a witness statement for use at trial; but

(b) is unable to obtain one, may apply, without notice, for permission to serve a witness summary instead.

(2) A witness summary is a summary of:

(a) the evidence, if known, which would otherwise be included in a witness statement; or

(b) if the evidence is not known, the matters about which the party serving the witness summary proposes to question the witness.

(3) Unless the court orders otherwise, a witness summary must include the name and address of the intended witness.

(4) Unless the court orders otherwise, a witness summary must be served within the period in which a witness statement would have had to be served.

(5) Where a party serves a witness summary, so far as practicable, rules 32.4 (requirement to serve witness statement for use at trial), 32.5(3) (amplifying witness statements), and 32.8 (form of witness statement) shall apply to the summary.

Consequence of failure to serve witness statement or summary

32.10 If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission.

Cross-examination on a witness statement

32.11 Where a witness is called to give evidence at trial, he may be cross-examined on his witness statement, whether or not the statement or any part of it was referred to during the witness's evidence-in-chief.

Use of witness statements for other purposes

32.12(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.

(2) Paragraph (1) does not apply if and to the extent that:

(a) the witness gives consent in writing to some other use of it;

(b) the court gives permission for some other use; or

(c) the witness statement has been put in evidence at a hearing held in public.

Availability of witness statements for inspection

32.13(1) A witness statement which stands as evidence in chief is open to inspection during the course of the trial unless the court otherwise directs.

(2) Any person may ask for a direction that a witness statement is not open to inspection.

(3) The court will not make a direction under paragraph (2) unless it is satisfied that a witness statement should not be open to inspection because of:

(a) the interests of justice;

(b) the public interest;

(c) the nature of any expert medical evidence in the statement;

(d) the nature of any confidential information (including information relating to personal financial matters) in the statement; or

(e) the need to protect the interests of any child or patient.

(4) The court may exclude from inspection words or passages in the statement.

False statements

32.14 (1) Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

(Part 22 makes provision for a statement of truth.)

(2) Proceedings under this rule may be brought only –

(a) by the Attorney General; or

(b) with the permission of the court.

Affidavit evidence

32.15 (1) Evidence must be given by affidavit, instead of or in addition to a witness statement if this is required by the court, a provision contained in any other rule, a practice direction or any other enactment.

(2) Nothing in these Rules prevents a witness giving evidence by affidavit, at a hearing other than the trial, if he chooses to do so in a case where paragraph (1) does not apply, but the party putting forward the affidavit may not recover the additional cost of making it from any other party unless the court orders otherwise.

[155] Rule 32.9 of the CPR 1998 envisages the situation where a party was unable to obtain a witness statement from an intended witness he could apply to the court for a direction which would permit him to exchange a witness summary instead. The adverse consequences of the failure to serve the witness statement or the witness summary are set out in r. 32.10 of the CPR 1998. While r. 32.11 of the CPR 1998 provides that where the witness's statement or part of it does not stand as his evidence-in-chief he may be cross-examined on it or on that part of it. Rule 32.12 of the CPR 1998, on the other hand, states that a witness statement "may be used only for the purpose of the proceedings in which it is served" and the exceptions as stipulated in (a) and (b) of r. 32.12(2) of the CPR 1998 are quite obvious. Witness statements standing as evidence-in-chief, according to r. 32.13 of the CPR 1998, are open to inspection unless the court otherwise directs. In *G10 Personal Investment Services Ltd v. Liverpool and London Steamship Protection and Indemnity Association Ltd* [1999] 1 WLR 984, CA, it was held that a person who was not a party to

a case which had been tried, but who was a party in related proceedings, was not entitled to inspect the documents referred and alluded to in the witness statements or the documents on the judge's reading list. The court, however, allowed the party to inspect and make copies of written submissions or skeletal arguments that was referred to by the judge.

[156] Rule 32.14 of the CPR 1998 does not make any substantial change to the law of contempt. It provides that proceedings for contempt of court may be brought against a person who makes or causes to be made a false statement without an honest belief in its truth in a document verified by a statement of truth. Finally, r. 32.15 of the CPR 1998 talks about affidavit evidence and it is self-explanatory.

[157] There is a Practice Direction pertaining to "Written Evidence" and it supplements the CPR 1998 Part 32 thereof. It relates to, *inter alia*, witness statements generally. I must be forgiven for reproducing some of them here:

Witness Statements

Heading

17.1 The witness statement should be headed with the title of the proceedings (see paragraph 4 of the practice direction supplementing Part 7 and paragraph 7 of the practice direction supplementing Part 20); where the proceedings are between several parties with the same status it is sufficient to identify the parties as follows:

	Number:
A.B. (and others)	Claimants/Applicants
C.D. (and others)	Defendants/Respondents (as appropriate)

17.2 At the top right hand corner of the first page there should be clearly written:

(1) the party on whose behalf it is made,

(2) the initials and surname of the witness,

(3) the number of the statement in relation to that witness,

(4) the identifying initials and number of each exhibit referred to, and

(5) the date the statement was made.

Body of Witness Statement

18.1 The witness statement must, if practicable, be in the intended witness's own words, the statement should be expressed in the first person and should also state:

(1) the full name of the witness,

(2) his place of residence or, if he is making the statement in his professional, business or other occupational capacity, the address at which he works, the position he holds and the name of his firm or employer,

(3) his occupation, or if he has none, his description, and

(4) the fact that he is a party to the proceedings or is the employee of such a party if it be the case.

18.2 A witness statement must indicate:

(1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and

(2) the source of any matters of information or belief.

18.3 An exhibit used in conjunction with a witness statement should be verified and identified by the witness and remain separate from the witness statement.

18.4 Where a witness refers to an exhibit or exhibits, he should state 'I refer to the (description of exhibit) marked "…".'

18.5 The provisions of paragraphs 11.3 to 15.4 (exhibits) apply similarly to witness statements as they do to affidavits.

18.6 Where a witness makes more than one witness statement to which there are exhibits, in the same proceedings, the numbering of the exhibits should run consecutively throughout and not start again with each witness statement.

Format of Witness Statement

19.1 A witness statement should:

(1) be produced on durable quality A4 paper with a 3.5 cm margin,

(2) be fully legible and should normally be typed on one side of the paper only,

(3) where possible, be bound securely in a manner which would not hamper filing, or otherwise each page should be endorsed with the case number and should bear the initials of the witness,

(4) have the pages numbered consecutively as a separate statement (or as one of several statements contained in a file),

(5) be divided into numbered paragraphs,

(6) have all numbers, including dates, expressed in figures, and

(7) give the reference to any document or documents mentioned either in the margin or in bold text in the body of the statement.

19.2 It is usually convenient for a witness statement to follow the chronological sequence of the events or matters dealt with, each paragraph of a witness statement should as far as possible be confined to a distinct portion of the subject.

Statement of Truth

20.1 A witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence; it must include a statement by the intended witness that he believes the facts in it are true.

20.2 To verify a witness statement the statement of truth is as follows:

I believe that the facts stated in this witness statement are true.

20.3 Attention is drawn to rule 32.14 which sets out the consequences of verifying a witness statement containing a false statement without an honest belief in its truth.

[158] The sum total of it all would be this. That it is evident that the position in Britian relating to the use of witness statements by way of evidence-in-chief is governed by various Rules as found in the CPR 1998 as well as in the Practice Directions.

[159] All these have been designed to assist the English courts to expeditiously dispose off their cases while at the same time ensuring the necessary checks and balances to be put in place. Should we incorporate the English Rules and the English Practice Directions as part and parcel of our law?

A

Conclusion

[160] In Malaysia, experts' reports including the medical experts' reports are privileged documents. Legal professional privilege attaching to these experts' reports held by an advocate is a basic and a fundamental common law right and it is encapsulated in our own s. 126 of the Evidence Act 1950. Thus, it would be wrong to compel production of the medical experts' reports before trial. But, if privilege is waived, disclosure and production of the medical experts' reports before trial would happen naturally. Here, unfortunately, privilege has not been waived by the parties.

[161] In Malaysia too, O. 35A r. 1 of the RHC is contrary to s. 138(1) of the Evidence Act 1950 and s. 15 of the Courts of Judicature Act 1964 (Act 91). Since O. 35A of the RHC is void by reason of inconsistency, the legal position may be stated as follows. That there is no statutory provision wherein the court may order an affidavit to be affirmed for use at the trial. The parties are not obliged to deliver their witnesses statements in advance of the trial. Procedurally speaking, witnesses must be subpoenaed to attend court and they must give their evidence orally at the trial.

[162] It is germane to mention that the Rules Committee's power to regulate the procedure and practice of the court does not extend to altering the rules of evidence.

[163] In Malaysia, there is no law which allows the right of pre-action discovery and we also do not have the right of discovery against non-parties. As demonstrated in the judgment, everything is lacking behind.

[164] With the benefit of hindsight, by virtue of r. 6 of O. 34 of the RHC, I varied those orders which I gave earlier. The parties are hereby directed to comply with O. 34 r. 4(2)(a), (c), (g) and (i) of the RHC. After consulting the parties and upon checking the court's diary, the hearing dates of this case are now scheduled for two weeks at a stretch and that would be on 6 November 2006 to 10 November 2006 and from 13 November 2006 to 17 November 2006.

I

[165] Perhaps, the Rules Committee would review O. 34 and 35A of the RHC in its entirety, in the near future. Perhaps, even the Rules Committee would fine tune O. 34 and 35A of the RHC in line with the law of the country. Parliament should even consider introducing those enabling legislations like what Britain had done so that our Rules Committee would allow by way of an amendment to the RHC pre-trial disclosure of experts' reports, including medical experts' reports, intended to be used at the trial.